

Central Law Journal.

ST. LOUIS, MO., JUNE 3, 1898.

The pertinent question whether the courts of a State which enacts a statute of another State, which has been construed by the courts of the latter State, are bound by such construction was recently presented to the Supreme Court of Montana in the case of *Oleson v. Wilson*, 52 Pac. Rep. 372. The statute which gave rise to the question was one taken by Montana from Minnesota, and which the courts of the latter State had construed prior to its adoption by Montana. It was urged that the courts of Montana were, therefore, absolutely bound by the construction placed upon the statutes by the Minnesota court, the construction thus given becoming a part of the statutes when adopted by the legislature of Montana. Courts have given respectful consideration to the construction of the statute made by the courts of the State from which they were taken, and have only departed from such construction for very strong reasons. But the rule is not an absolute or inflexible one, requiring a strict adherence to such construction. Especially is this true when such construction of a borrowed statute would not be in harmony with the spirit, policy and environments of the people of the State which had borrowed the statute. This has been the almost universal rule, and one which the court in the present case adopted. Mr. Justice Piggott dissented, however, from the majority opinion. Pemberton, Chief Justice, who wrote the majority opinion, held that where a State enacts the statute of another State, which has been construed by the latter's courts, the former State is not bound by such construction, saying, that "we admit that the construction put upon statutes by the courts of the State from which they were borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it. Our court has always followed this rule. But we do not admit that such construction of borrowed statutes should prevail, when not in harmony with the spirit and policy of our own legislation and decisions."

In 1897 the legislature of the State of Washington enacted a law providing that a

contract, loan, bond or mortgage may be paid in any kind of lawful money or currency of the United States, any provision therein to the contrary notwithstanding and declaring unenforceable a provision for payment in any particular kind of money. The validity of this statute recently came before the Supreme Court of Washington, in the case of *Dennis v. Moses*. It was held that the act was invalid and void as being an attempt to legislate on a subject belonging exclusively to the federal government. The effect of the statute, says one member of the court, making the contract for specific money soluble in lawful money of the United States involves a federal question, and seems to have been determined by the controlling authority,—the Supreme Court of the United States. The power of the State to declare a legal tender is limited to gold and silver coin. All "lawful money" of the United States is not a legal tender for private obligations by the laws of the United States; but, under the grant of power to coin money and regulate the value thereof, the federal supreme court has decided that the question relating to final payment in private contracts is one exclusively of federal jurisdiction, and vested in congress. The legal tender and gold contract decisions, taken in connection with the recent case of *Woodruff v. Mississippi*, 162 U. S. 291, 16 Sup. Ct. Rep. 820, are controlling. The jurisdiction of the federal court would not, in this case, have been sustained on any other principle than complete federal control of such contracts. This conclusion is manifestly apparent from both the majority and minority opinions given in the case. A different question would be presented in contracts made by the State, or municipal corporations controlled by the State.

This conclusion is undoubtedly correct, but a similar result might also have been reached on the ground of unwarrantable interference with the freedom of contract which is in derogation of both federal and State constitutions. It is contended by those who are interested in upholding "gold clause" contracts, and has been held to be the law by some of the courts, that if contracts to pay gold coin are simply engagements for the delivery of a specific commodity, a State legislature has no right to interfere with the enforcement of such contracts according to their terms, unless un-

der police power, and that the burden of showing an overwhelming public necessity for such interference is upon those who claim that the contracts should not be enforced.

NOTES OF IMPORTANT DECISIONS.

MUNICIPAL CORPORATION—STREETS—TELEPHONE SYSTEM—CONSTRUCTION.—It is held by the Supreme Court of Indiana, in *Magee v. Overshiner*, 49 N. E. Rep. 951, that the use of streets prevailing at the time of the taking or dedication is not the limit of the use to which the public is entitled, and which the soil owner is deemed to have contemplated, but such use is to be enlarged to include all improved methods of attaining the same objects and enjoying the same privileges, not, however, to the denial or substantial impairment of the fee owner's use and enjoyment of his abutting property; that the erection of telephone systems upon city streets is not an additional servitude, for which the adjacent fee owners are entitled to compensation, but is within the contemplated uses of the street at the time of the dedication; and that a telephone system may be owned and conducted by an individual without legislative consent where there are no restrictions upon such right. The court says in part:

"Is the telephone, with its necessary poles and wires, to be regarded as a new use, so disconnected from the purposes and objects in actual and legal contemplation when our city streets were dedicated or condemned as to constitute an additional servitude? The telegraph equipment, in its occupancy of the highway or street and its uses, is the nearest parallel we have to that of the telephone system. They are both inventions for communication by electricity. The equipment occupying the streets is the same. Some authorities have attempted to distinguish between the uses contemplated of city streets and of suburban highways. This distinction was recognized by this court in *Kincaid v. Gas Co.*, 124 Ind. 579, 24 N. E. Rep. 1067, where this language was employed: 'There is an essential distinction between urban and suburban highways, and the rights of the abutters are much more limited in the case of urban streets than they are in the case of suburban ways. We note the distinction between the classes of public ways, and declare that the servitude in the one class is much broader than it is in the other.' In *Elliott, Roads & S. p.* 299, it is said: 'There is an essential difference between urban and suburban servitudes. The owner of the dominant estate in an urban servitude has very much more authority and much greater rights than the owner of the dominant estate in a suburban servitude. The easement of the one is very much more comprehensive than of the other. It is doubtful whether, of all the servitudes, there is one so broad and comprehensive as that of a city in its streets.' Again, the same

author says, on p. 307: 'The easement in a city is so broad and exclusive as to leave very little, if any, private right of use in the owner of the servient estate.'

"If this doctrine is accepted—and we think it must be—the cases which hold that telegraph and telephone lines upon country highways are an additional servitude cannot be given much weight in determining the question before us. However, those cases which hold that these uses of the suburban ways are not an additional servitude, if their reasoning is tenable, apply to cases of city streets with greater force than to those of country ways. *Cater v. Telephone Co.*, *supra*, is such a case. In addition to the pertinent quotation already made from that case, we quote the following: 'We are not unmindful that private property cannot be taken for a public use without compensation, however important that public use is. We are not forgetful of the fact that care should be taken that, in the popular zeal for modern public improvements, the burden of furnishing these improvements should not be shifted from the public, and imposed upon any particular class of individuals. But viewing, as we do, highways as being designed as public avenues of travel, traffic, and communication, the use of which is not necessarily limited to travel and the transportation of property in moving vehicles, but extends as well to communication by the transmission of intelligence, it seems to us that such a use of a highway is within the general purpose for which highways are designed, and, within the limitations which we have suggested, does not impose an additional servitude upon the land; in short, that it is merely a newly-discovered method of using the old public easement.' Another case of the same character is that of *People v. Eaton* (Mich.), 59 N. W. Rep. 145. It was there said: 'When these lands were taken or granted for public highways, they were not taken or granted for such use only as might then be expected to be made of them, by the common methods of travel then known, or for the transmission of intelligence by the only methods then in use, but for such methods as the improvement of the country or the discoveries of future times might demand. * * * It would be a great calamity to the State if, in the development of the means of rapid travel and the transmission of intelligence by telegraph or telephone communication, parties engaged in such enterprises were compelled to take condemnation proceedings before a single track could be laid or a pole set.' This latter proposition can be the better appreciated by the supposition that in the city of Indianapolis a telephone company should be required to make legal condemnations as to the 20,000 or more properties fronting upon the streets of that city.

"The cases of *Pierce v. Drew*, 136 Mass. 75, *Telephone Co. v. Keesey*, 5 Pa. Dist. R. 366, and *Julia Bldg. Assn. v. Bell Tel. Co.*, *supra*, are directly in point in holding that the erection of

telephone systems upon streets is not an additional servitude for which the adjacent fee owner is entitled to damages, but that such use, being an improved method of transmitting intelligence, and a substitute for the messenger upon foot, on horseback, or by vehicle, is within the contemplated uses at the time of the dedication. In the last case cited, it was said: 'These streets are required by the public to promote trade and facilitate communications in the daily transactions of business between the citizens of one part of the city and those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business at one end of Sixth street wishes to communicate with a citizen living and doing business on the other end, or at any intermediate point, he is entitled to use the street, either on foot, on horseback, or in a carriage, or other vehicle in bearing his message. The defendants in this case propose to use the street by making the telephone poles and wires the messenger to bear such communications instantaneously, and with more dispatch than in any of the above methods or any other known method of bearing oral communication. Not only would such communications be borne with more dispatch, but, to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen and carriages. If a thousand messages were daily transmitted by means of telephone poles, wires and other appliances used in telephoning, the street through these means would serve the same purpose which would otherwise require its use either by a thousand footmen, horsemen or carriages to effectuate the same purpose. In this view of it, the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude, would, to the extent of each message transmitted, relieve the street of a servitude or use by footman, horseman or carriage.' In the case of *Pierce v. Drew*, *supra*, a like reasoning is adopted. It is there said: 'The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post boy or the mail coach. It is a newly-discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out.' In *Hershfield v. Telephone Co. (Mont.)*, 29 Pac. Rep. 883, it was held that the telephone equipment was not a new and additional burden upon the fee in a city street; quoting with approval from *Julia Bldg. Assn. v. Bell Tel. Co.*, *supra*. It is true that it was further held that the fee in the street was not in the abutting owner, but the proposition is distinctly adopted that it is germane to the proper use of streets to allow the setting of poles and wires for the telephone. In

McCormick v. District of Columbia, 4 Mackey, 396, the right of the telephone system to occupy the streets as a proper street use was held. The same right was recognized in *Irwin v. Telephone Co.*, 37 La. Ann. 63; but it was placed upon the rule that the abutting owner could not complain, since the fee in the street was in the public. We observe no means of distinguishing against the telephone equipment, on the ground that its poles are not in motion as are ordinary instruments of travel, since the permanent occupancy by the trolley poles, the gas and water pipes, etc., is maintained. See *People v. Eaton (Mich.)*, 59 N. W. Rep. 145; *Telephone Co. v. Keesey*, *supra*.

'If the existence of private benefit to the fee owner were the turning point between the admission of those things not instruments of travel or movement, as the fire cistern, the illuminating and heating gases, the water pipes, sewers, etc., and the telephone, it would be exceedingly difficult to establish the absence of private benefit to the property owner and business man in the employment of the telephone. Opposed to the view of the question as we have presented it are cited several authorities. *Stowers v. Telegraph-Cable Co.*, 68 Miss. 559, 9 South. Rep. 356, involved the right to place telegraph poles upon the sidewalk in the city of Vicksburg. The controlling portion of the opinion is, as follows: 'There is some conflict in the authorities, but the decided weight is to the effect that telegraph companies form no part of the equipment of a public street, but are foreign to its use, and that, where the abutting owner is the owner of the fee to the center of the street, he is entitled to additional compensation for the additional burden placed upon his land. *Lewis, Em. Dom.* § 131, citing *Telegraph Co. v. Barnett*, 107 Ill. 507; *Dusenbury v. Telegraph Co.*, 11 Abb. N. C. 440; *Metropolitan Telephone & Telegraph Co. v. Colwell Lead Co.*, 50 N. Y. Super. Ct. 488; *Broome v. Telegraph Co.*, 42 N. J. Eq. 141, 7 Atl. Rep. 851. *Contra: Hewett v. Telegraph Co.*, 4 Mackey, 424; *Pierce v. Drew*, 136 Mass. 75; *Julia Bldg. Assn. v. Bell Tel. Co.*, 88 Mo. 258.' All of the cases cited by the court as in conflict with its opinion have been cited by us. Those cited in support of the opinion are by reference to *Lewis on Eminent Domain*, where the text is supported by the four cases first named by the court. Of those cases, *Telegraph Co. v. Barnett*, *supra*, involved the location of a telegraph pole in a rural highway, as did also *Dusenbury v. Telegraph Co.*, *supra*. In *Broome v. Telegraph Co.*, *supra*, the statute authorizing the establishment of the system required that the consent in writing, of the property owners, should be procured for the purpose, and without such consent the right was denied. The one case cited in the *Stowers Case* giving it any support was *Metropolitan Telephone & Telegraph Co. v. Colwell Lead Co.*, *supra*. That case broadly asserts that the telegraph service is not a street use. That conclusion is at variance with our conclusion.

"Among the other cases cited by counsel for the appellant are *Eads v. Telegraph Co.* (N. Y. App.), 38 N. E. Rep. 202; *Telegraph Co. v. Williams*, 86 Va. 696, 11 S. E. Rep. 106; *Cable Co. v. Irvine*, 49 Fed. Rep. 113, in each of which the question was as to the erection of telegraph poles upon a rural highway; and, if the distinction heretofore maintained is correct, they are not authorities in this case. In *Willis v. Telegraph Co.*, 37 Minn. 347, 34 N. W. Rep. 337, the judgment of the trial court, holding the telephone pole upon the city street an additional servitude, was affirmed upon a division of the court, and for the lack of a majority for either side of the question. It is, therefore, of little force as an authority. The only other decision, thought to be analogous, to which we have been cited, or which our extended researches have discovered, is that of *Telephone Co. v. Mackenzie*, 74 Md. 36, 21 Atl. Rep. 690. In that case the complaint was held sufficient upon the general allegation that the pole planted in the footway in front of the plaintiff's warehouse 'obstructs and prevents the comfortable and reasonable and beneficial enjoyment and use of said premises' without permission and without payment of compensation. It was held to present a cause of action for a direct interference with the use of the warehouse, and the question of the use of a street or a highway as an additional servitude was expressly held not to be involved. It was held, also, that the legislature had not and could not authorize the substantial impairment of such beneficial enjoyment of one's property. We do not, therefore, regard that case as in point. Nor do we regard the *New York Elevated Steam Railway Cases* as in point. Those cases correctly held, as we think, that the use of the street for such railway was an obstruction of the easements of access, light and air, if not an anticipated street use."

ATTEMPTS TO COMMIT IMPOSSIBLE CRIMES.

I. The first inquiry suggested by a consideration of our subject is, what are the elements of an attempt to commit a crime, generally. For it is conceived that there should exist in this case, as in that of any substantive crime, certain *criteria* which, theoretically at least, will furnish an unfailing test for determining when an offense of this nature has been committed. In the very nature of things this must be so. A man charged with crime and compelled to submit to the judgment of his fellow men would oftentimes be accorded little of that universal impartiality which is supposed to accompany the administration of an advanced system of law, if his guilt or innocence were dependent upon rules whose chief

element is uncertainty. On the other hand, the peace and good order of society would be seriously imperilled by the ever present possibility of immunity of the individual from justice, if that justice were in its nature indeterminate. From either point of view, the result would ill accord with the tenets of a christian civilization and do small honor to a system of jurisprudence declared to have been established in "the perfection of reason." These observations apply to all offenses by the individual against organized society; hence, it will be seen that attempts to commit crime, punishable under the law as such, are not excluded. A true definition of any crime should embody a statement of all its elements. Does there exist such a definition of an attempt? Until very recently the treatment of this subject by text-writers was exceedingly fragmentary. This was due no doubt to the fact that decided cases, while valuable and instructive as illustrations, have been found remarkably deficient in the discussion of elementary principles; being confined for the most part to the application of precedents to the case in hand,—precedents in the formation of which the quality of reason has quite too often been found absent. In the second edition of the *American and English Encyclopædia of Law*, however, the authorities on this subject are collected and arranged with great care, and from them a definition of an attempt is deduced which is worthy of consideration. "An attempt to commit a crime is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possessing, except for failure to consummate, all the elements of the substantive crime."¹ We have here two principal elements: the criminal design or intent and the overt act. It is noteworthy that in every crime known to the law these two elements must co-exist;² and from this we conclude that every attempt to commit a crime which the law punishes is itself a crime. In classifying crimes, the common law makes two grand divisions, based presumably upon the different degrees of danger to society likely to result from their commission, and characterized by vastly differing grades of

¹ 3 Am. & Eng. Ency. of Law (2d Ed. 1897), p. 250.

² *State v. Wells*, 31 Conn. 210; *Cox v. People*, 82 Ill. 191; *Cunningham v. State*, 49 Miss. 686.

punishment. These are felonies and misdemeanors. It has long been well settled that an attempt to commit a crime is a misdemeanor, if punishable at all, whether the crime attempted be a misdemeanor or a felony.³ At first glance the reason for this seems obvious, *i. e.*, that the resulting injury of a mere attempt can never be equal in degree to that of the crime attempted. Nevertheless it is equally plain that the injury to society likely to attend the commission of certain attempts may be far more serious than the actual consequences of another completed felony. Take, for instance, an attempt to rape or an attempt to murder and contrast therewith a larceny actually committed. To remedy this defect in the common law many statutes have been enacted declaring that certain attempts shall be punishable as felonies. Following this thought we are led to consider another distinction of perhaps greater importance, and one which has been tacitly rather than expressly recognized in the decisions, *viz.*, that attempts to commit crimes *mala in se* are punishable as offenses, but that when a crime is *malum prohibitum* merely, an attempt to commit it is either no offense at all or not such as the law will notice and punish.⁴ A great deal of confusion with respect to this distinction has arisen by reason of the *dictum* of an eminent judge in an old English case that, "an attempt to commit a misdemeanor is a misdemeanor whether the offense is created by statute or is an offense at common law."⁵ By this was meant that the mere fact that a particular act was a crime only by force of a statute would not prevent it from being *malum in se* if it were so in fact; or, in other words, that a statute intended to remedy a palpable defect in the common law did not make an act previously wrong in itself wrong only because of the statute. And this the facts of the case clearly show. The prisoner was indicted for attempting to carnally know a child under the age of twelve years and over ten, consent to the act being given. The "age of consent" at common law being ten years there could be no attempt to rape; but by statute carnal knowledge of a girl under

twelve years and over ten was made a substantive crime, and, being *malum in se* in the proper meaning of that term, the defendant was held answerable for the attempt. The justice of this decision cannot be doubted, but the *dictum* quoted affords a striking example of the difficulties sometimes to be encountered in arriving at a conclusion of common sense by a process of legal reasoning. Quoting this *dictum* with approval, several cases in the United States deny the existence of the distinction contended for; but an examination of the facts in each case shows that the reasoning thus adopted is as elusive as in the principal case and wholly unnecessary.⁶ On the other hand the distinction is clearly marked, although not always recognized as such, in a number of authoritative decisions. Thus, where to take usury,⁷ to bet on a horse race,⁸ to sell spirituous liquors,⁹ to introduce liquors into Alaska,¹⁰ and to sell cotton in the seed between sunset and sunrise,¹¹ were by statute made misdemeanors, attempts to commit them were held not indictable.

II. 1. Bearing in mind the principles already noticed, a discussion of the subject of attempts to commit impossible crimes may proceed with reference to the two elements which have been pointed out. We have seen that these elements must co-exist. If, therefore, a crime becomes impossible by reason of considerations affecting the existence of the intent it may be placed in one category, and if the non-existence of a sufficient act is the cause of impossibility its place is in another, and we have two classes.

2. It is well settled, upon great consideration, that an intent to commit a specific crime is essential to the commission of an attempt, and that therefore it must be alleged in the indictment and proved as a matter of fact.¹² But how are we to ascertain the thoughts which are conceived in the mind of any man? Clearly, by looking to their outward manifestations, and drawing therefrom the inferences which common experience teaches us are

³ *Smith v. Com.*, 54 Pa. St. 209, 93 Am. Dec. 686; *State v. Avery*, 7 Conn. 266, 18 Am. Dec. 105.

⁷ *Rex v. Upton*, 2 Strange, 816.

⁸ *Dobkins v. State*, 2 Humph. (Tenn.) 424.

⁹ *Com. v. Willard*, 22 Pick. (Mass.) 476; *Pulse v. State*, 5 Humph. (Tenn.) 108.

¹⁰ *U. S. v. Stephens*, 8 Sawy. (U. S.) 116.

¹¹ *Whitesides v. State*, 11 Lea (Tenn.), 474.

¹² 3 Am. & Eng. Ency. of Law (2d Ed.), 255, and cases cited.

³ 3 Am. & Eng. Ency. of Law (2d Ed.), 251.

⁴ *Taylor v. State*, 11 Lea (Tenn.), 708, 17 Cent. L. J. 27, 4 Crim. Law Mag. 1, 13.

⁵ *Parke, B.*, in *Rex v. Roderick*, 7 Car. & P. 795. See, to the same effect: *Rex v. Butler*, 6 Car. & P. 368; *Rex v. Cartwright*, R. & R. C. C. 106.

necessarily true. It has been well said that "intentions can only be proved by acts, as juries cannot look into the breast of the criminal."¹³ Hence, it follows that mental incapacity of an accused person must, when shown, at once negative the intent necessary to be charged; for if the mind is incapable of entertaining the intent it cannot be manifested, the crime is impossible, and the attempt to commit it cannot legally be punished. On this ground it was held in the Texas Court of Appeals,¹⁴ in a prosecution for an attempt to rape, that excessive drunkenness of the accused at the time of the alleged attempt fairly raised the question of mental capacity to conceive the criminal intent, and demanded of the trial judge the following charge: "If the defendant's mental faculties were so far overcome by intoxication that he was not conscious of what he was doing, or that if his actions and the means used were naturally adapted or calculated to effect his purpose, still, if he had not sufficient capacity to entertain the intent to ravish Mrs. R, in that event they should not infer that intent from his acts."¹⁵ Other courts of the highest authority have taken a like view where the attempt was to commit suicide,¹⁶ to pass counterfeit money,¹⁷ and to steal a horse.¹⁸ The contrary view has been held by the Supreme Court of Alabama,¹⁹ following by way of analogy the doctrine of implied intent in completed crimes: that the offender must be held to have intended the consequences of his acts. But this is manifestly unsound, for in an attempt there may be no consequences; and, moreover, this would establish a presumption of law at variance with a possible fact and contrary to common experience.²⁰

3. Greater difficulties are encountered where no question is raised as to mental capacity. We believe that the authorities show, that there are no presumptions in the law of attempts which require that the specific in-

tent shall be found conclusively upon proof of any particular acts; but that it is the province of the jury to say whether the intent did or did not exist.²¹ So far as the State is concerned, they are the sole judges and the judgment is final. No question of law can possibly arise in case of an acquittal. With respect to the rights of the prisoner, the case is different. It is the duty of the jury to consider all the evidence and to decide from all the circumstances whether the requisite intent was present and co-existed with the act, beyond a reasonable doubt. It is the duty of the judge to define the law relating to the offense charged and instruct the jury therein; and if, after a verdict of guilty, it shall appear that upon all the evidence the verdict is such that it could not be reasonably found by a jury of reasonable men, it is his further duty to set it aside and grant a new trial. What circumstances then will justify the exercise of this limited discretion? The cases are numerous. In an attempt to commit murder there must be a specific intent to kill.²² But a mistake in the identity of the person attempted to be killed does not negate this intent, and therefore a refusal to set aside a verdict of guilty on that ground is not reversible error. As, for instance, where one shoots at another believing him to be a different person.²³ This is a plain case. One of more difficulty is presented where, instead of a mistake of identity, the attempt is to shoot one and another is accidentally hit. But the same rule should govern here, for the intent is specific, *i. e.*, to kill the person shot at. It cannot be maintained that to hit the mark is necessary to an attempt; certainly not to show the intent; and so by the greater weight of authority.²⁴

4. Yet, where the attempt is a statutory offense, rules of pleading may establish an exception. Thus, where in a prosecution for assault with intent to kill, it appeared that the prisoner, being irritated by a crowd of boys who were following him, discharged a

²¹ See cases cited in 3 Am. & Eng. Ency. of L. (2d Ed.) 255.

²² *Ibid.* p. 257, and examples given.

²³ *Reg. v. Smith*, Dears C. C. 559, 25 L. J. N. S. M. C. 29, 7 Cox, 51.

²⁴ *Reg. v. Stopford*, 11 Cox C. C. 643; *Dunaway v. People*, 110 Ill. 333, 51 Am. Rep. 686; *State v. Gilman*, 69 Me. 163, 31 Am. Rep. 257; *State v. Jump*, 90 Mo. 171; *State v. Montgomery*, 91 Mo. 52. *Contra*, *Reg. v. Hewlett*, 1 F. & F. 91; *Lacefield v. State*, 34 Ark. 275, 36 Am. Rep. 8; *Com. v. Morgan*, 11 Bush (Ky.), 601.

¹³ *People v. Scott*, 6 Mich. 296.

¹⁴ *Reagan v. State*, 28 Tex. App. 227; compare *Pugh v. State*, 2 Tex. App. 539.

¹⁵ See also, to the same effect: *Walker v. State*, 7 Tex. App. 627.

¹⁶ *Reg. v. Moore*, 3 Car. & K. 319.

¹⁷ *Pigman v. State*, 14 Ohio, 555.

¹⁸ *Hall v. Com.*, 78 Va. 678.

¹⁹ *State v. Bullock*, 13 Ala. 413; but see, *Morgan v. State*, 33 Ala. 413.

²⁰ *Roberts v. People*, 19 Mich. 401; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *State v. Stewart*, 29 Mo. 419.

loaded pistol among them and thereby wounded a passer-by, these facts were held in England not sufficient to warrant an inference of intent to kill the person injured; Jervis, C. J., saying: "I do not think that the charge contained in the indictment is proved. Doubtless at common law if the person wounded had been killed it would have been murder. But this is an offense under the statute and must be proved strictly in its very terms."²⁵ In Delaware and Indiana this exception has been denied.²⁶

5. In an attempt to commit rape, there must exist an intent to use such force as will accomplish the offender's purpose without the consent of the female; and here, as in attempts to murder, the question of intent is for the jury upon all the circumstances of the case. The nature of this crime, upon which it is unnecessary to dwell, has led to the adoption of a presumption of law, commonly known as the age of consent rule, whereby females under ten years of age at common law²⁷ are conclusively presumed incapable of consenting to the sexual act.²⁸ Under this salutary rule juries are warranted in finding,—in truth it is their sworn duty to find,—the intent to use force from the act itself, though the girl consented. Where the sexual act has been accomplished, the case is very simple; no further proof of the intent need be shown. But in case of a mere attempt, the intent to accomplish the act is a question for the jury. And in this, as in all other cases, they must exercise their judgment as a jury of reasonable men, else a verdict of guilty should be set aside. An inflexible standard of reasonableness cannot be set up to guide the decision of every case. It rests primarily in the minds of the individual jurors and may be fairly taken to be represented in their collective action. Yet, in behalf of the accused, the court has a supervisory power. This power was invoked after a verdict of guilty of an attempt to rape where the facts were that the accused had decoyed a female child into a deserted building and was detected within a few feet of her in a state of indecent ex-

posure, although he had not touched her; but the court declined to disturb the verdict, holding that no actual violence need be shown, as a matter of law, in order to evince an intent to ravish.²⁹ The same was held where the facts were that the female awoke and found the accused in bed with her, who escaped when she called for help.³⁰ Also in a case where the accused was discovered at two o'clock in the morning in a state of undress, stooping over the bed where a woman lay asleep.³¹ And again, where a woman was awakened by the bed clothes being pulled by the accused.³² But in the following cases the facts shown were deemed insufficient to warrant a finding of the necessary intent: mere solicitation, however earnest, unaccompanied by an offer to use force;³³ gross liberties, not amounting to force, threats or fraud, as where the accused had entered a woman's bed-room and touched her with his hand,³⁴ where a negro partially naked had entered a bed-room where several girls were sleeping and turned one of them over, but fled when she awoke,³⁵ where a negro in a similar condition, pursued a white woman who was passing along the road, called to her to stop, but himself stopped when within ten feet of her,³⁶ and where the accused called a woman by her Christian name and fled when she screamed.³⁷ In a recent Alabama case it was held that an attempt to carnally know a girl under the age of consent does not constitute an attempt to rape; that notwithstanding the provisions as to the age of consent, the female thus deemed in law incapable of consenting to the act, may nevertheless consent in fact, and if she does actually consent, then an actual intent in the mind of the accused to use force at all events must be shown by proof of sufficient manifestations, unless the child is under the age of seven years.³⁸ This decision seems to rest upon a belief that the rule about the age of consent eliminates entirely the element of force in rape where the victim is a child under

²⁹ *Hays v. People*, 1 Hill (N. Y.), 351.

³⁰ *Carter v. State*, 35 Ga. 263.

³¹ *State v. Smith*, 80 Mo. 516.

³² *Dibrell v. State*, 3 Tex. App. 456.

³³ *House v. State*, 9 Tex. App. 53; *Thomas v. State*, 16 Tex. App. 533.

³⁴ *Thompson v. State*, 43 Tex. 583; *Taylor v. State*, 50 Ga. 79.

³⁵ *Charles v. State*, 11 Ark. 389.

³⁶ *Lewis v. State*, 35 Ala. 380.

³⁷ *Carroll v. State*, 24 Tex. App. 366.

³⁸ *Toulet v. State*, 100 Ala. 72.

²⁵ *Reg. v. Lallement*, 6 Cox C. C. 204; see also *Rex v. Melhorne*, 1 Crawf. & Dix. C. C. 156.

²⁶ *State v. Sloanaker*, *Houst. Cr. Cas. (Del.)* 62; *Walker v. State*, 8 Ind. 290.

²⁷ In the United States the age of consent varies from 10 to 18 years.

²⁸ 3 Am. & Eng. Ency. of Law (2d Ed.), 259, and cases cited.

that age; being therefore an exception to the general rule it should be strictly construed; that a strict construction requires that the completed crime should alone furnish a basis for its operation; and hence that it has no application in case of a mere attempt. The fallacy of this reasoning may appear when it is suggested that it is the consent of the child and not the intent of the offender to use force which is eliminated; for it may fairly be supposed that an intent to use brutal force is necessarily involved in an attempt to consummate the act upon the person of a girl of tender years, even with her consent. The jury should be allowed to draw this inference; otherwise, such an attempt is under our law no crime at all,—an impossible crime.

6. A recognized authority on criminal law says: "The peculiar offense of rape is not committed when the man obtains the woman's consent by a fraud, as by impersonating the husband. This is a technicality in rape, perhaps derivable more from ancient precedents than from the reasonings of the law; but whether so or not our courts cannot change it."³⁹ And this assertion is supported by a number of the older authorities, which hold that an attempt under such circumstances is in effect an attempt to commit an impossible crime, the intent to use force not being shown.⁴⁰ But it seems to us that such a rule of law is inexpedient, and that here again the jury should be allowed to say whether a man who thus attempts to accomplish the sexual act may not by so doing manifest an intent to use force if necessary. We are therefore inclined to assent to another and different statement of the law which is that "where such fraud is used as would justify a virtuous female in submitting to the act, the actual intent to use violence if other means fail need not [otherwise] be shown."⁴¹ This view is supported by the later, and it would seem, the more satisfactory, authorities.⁴² By a parity of reason an attempt on the person of a sleeping woman may sufficiently evince an intent to use

force. Conceding that under ordinary conditions the sexual act would be impossible of completion in such a case, that fact is rather in favor of the inference of an intent to use force than against it.⁴³ Some authorities take the opposing view, however, on the ground before noticed; but they constitute a very decided minority.⁴⁴ A plainer case is presented where an attempt is made upon the person of an idiotic or insane woman. Here there would seem to be little doubt.⁴⁵ Yet it has been held that a vestige of reason, mere animal instinct in fact, is sufficient to create a capacity to consent.⁴⁶

7. Much doubt is found to exist in the authorities as to whether physical incapacity to consummate a particular crime is such a mark of impossibility as will excuse an attempt. The following test has been suggested: If the incapacity was apparent and known to the accused, the requisite intent does not appear and there is no crime.⁴⁷ This is a reasonable statement of an inference to be drawn from one conclusion, resulting in another. But as a rule is it of any value? The question of whether the incapacity was apparent and known to the accused must still be left to the jury.⁴⁸ If the crime was incomplete, as an attempt must be, there is generally no means of ascertaining whether the accused was aware of his incapacity; and to require the jury as matter of law to pass upon a conjectural fact would lead to endless confusion. This difficulty has been obviated in many cases of attempted rape by applying another arbitrary and reasonless rule of law, *i. e.*, that a boy under fourteen shall be conclusively presumed incapable of attempting to commit rape, rendering the crime as to such persons impossible.⁴⁹ This is apparently an extension of a similar rule obtaining in cases of completed rape, established in ancient times when the

³⁹ Reg. v. Mayers, 12 Cox C. C. 311; Reg. v. Young, 14 Cox C. C. 114; Harvey v. State, 53 Ark. 425; State v. Shepard, 7 Conn. 54; Carter v. State, 35 Ga. 263; State v. Smith, 80 Mo. 516.

⁴⁰ Charles v. State, 11 Ark. 410; King v. State, 22 Tex. App. 650; Com. v. Fields, 4 Leigh (Va.), 648.

⁴¹ Reg. v. Fletcher, Bell C. C. 63; State v. Atherton, 50 Iowa, 189, 32 Am. Rep. 134.

⁴² Reg. v. Barratt, 12 Cox C. C. 498; Reg. v. Conolly, 26 Up. Can. Q. B. 317.

⁴³ Robinson's Elem. Law, sec. 472; Kunkle v. State, 32 Ind. 231.

⁴⁴ Nugent v. State, 18 Ala. 521.

⁴⁵ Rex v. Eldershaw, 3 Car. & P. 396; Reg. v. Phillips, 8 Car. & P. 736; State v. Handy, 4 Hart. (Del.) 566.

³⁹ 1 Bishop's New Cr. Law, sec. 261.

⁴⁰ Reg. v. Saunders, 8 Car. & P. 265; Reg. v. Williams, 8 Car. & P. 286; Reg. v. Barrow, L. R. 1 C. C. 156; Reg. v. Sweeney, 8 Cox C. C. 223 (2 judges dissenting); Rex v. Jackson, R. & R. C. C. 487 (4 judges dissenting).

⁴¹ 3 Am. & Eng. Ency. of Law (2d Ed.), 260.

⁴² Reg. v. Dee, 15 Cox C. C. 579; Reg. v. Flattery, L. R. 2 Q. B. Div. 410; State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79; State v. Shepard, 7 Conn. 54; People v. W., 1 Wheeler Cr. Cas. (N. Y.) 378.

elements of rape were different than now, and adhered to for unknown reasons until its existence has become a matter of astonishment and reproach. Absurd rules are allowed under our system to exist until abrogated by statute, but should not be extended by analogy. This is the view of the American courts so well expressed in *Commonwealth v. Green*,⁵⁰ by the Supreme Judicial Court of Massachusetts: "The law which guards infants under fourteen as incapable of committing rape was established *in favorem vite*, and ought not to be applied by analogy to an inferior offense, the commission of which is not punishable with death. A minor of fourteen years of age, or just under, is capable of that kind of force which constitutes an essential ingredient in the crime of rape, and he may make an assault with intent to commit that crime, although, by an artificial rule, he is not punishable for the crime itself. An intention to do an act does not necessarily imply an ability to do it; as a man who is emasculated may use force with intent to ravish although possibly, if a certain effect should be now, as it was formerly held essential to the crime, he could not be convicted of rape. Females might be in as much danger from precocious boys as from men if such boys are to escape with impunity from felonious assaults, as well as from the felony itself." Upon these considerations it is held, in conformity with the weight of reason at least, that the question of capacity as bearing upon the ultimate one of intent is for the jury, judging from all the evidence, unhampered by any presumption of law, or any rule except the standard of reasonableness before adverted to.⁵¹ We also find this principle applied in a prosecution of an adult for an attempt to have carnal knowledge, the jury being instructed that they might consider the fact that the sexual parts of the accused had become debilitated from excessive use of alcohol.⁵²

III. 1. We find it laid down that "the law does not punish mere intention but requires some overt act in an endeavor to carry that intention into execution.⁵³ And this may safely be regarded as a maxim in criminal law; not

founded in logic, it is true, but in a practical and imperative necessity, which is, the impossibility of judging the intent otherwise than by acts. If in the case of any crime or any attempt a rule of law exists which defines the overt act necessary to its commission, the jury are obliged to find such act as a fact beyond a reasonable doubt, in addition to the specific intent, else a verdict of guilty should be set aside. If, however, no such rule exists in a given case, the overt act which must be found is that which sufficiently manifests the intent.⁵⁴

2. Recurring to our definition of an attempt it will be seen that the act must amount to more than mere preparation. By this is meant that whenever in the opinion of the trial court the acts proved are so remote that from them a jury of reasonable men cannot reasonably infer the specific criminal intent, a verdict of guilty must not be allowed to stand. Clearly, this is a matter of discretion. The existence of the discretion is alone a matter of law. The decisions which illustrate its exercise form a class of instructive precedents, but they establish no other rule.⁵⁵ Thus, it cannot be said as matter of law that the act proved, in order to be properly efficient, must be the last proximate act.⁵⁶ For instance, it has been held that where the accused went to a house carrying a kit of burglar's tools and was caught in the act of entering a shop to procure a crowbar to use in breaking into the house, these acts were not too remote to constitute an attempt to commit burglary.⁵⁷ So, where the accused climbed on a roof and made a hole.⁵⁸ So also, procuring indecent prints with intent to publish them;⁵⁹ obtaining dies for coining counterfeit money;⁶⁰ taking an impression of a key with intent to enter a house by its aid;⁶¹

⁵⁴ *Cunningham v. State*, 49 Miss. 702. It is generally held that there must be some "physical act as contradistinguished from a verbal declaration." *Cox v. People*, 82 Ill. 191; *State v. Harney*, 101 Mo. 470.

⁵⁵ See *Reg. v. Eggleton*, Dears. C. C. 515; *Reg. v. Cheeseman*, 9 Cox C. C. 100; *Reg. v. McCann*, 28 Up. Can. Q. B. 516; *State v. Clarissa*, 11 Ala. 57; *People v. Hope*, 62 Cal. 297; *Sipple v. State*, 46 N. J. L. 197; *State v. Colvin*, 90 N. Car. 717; *Lovett v. State*, 19 Tex. 177.

⁵⁶ *Reg. v. Goodman*, 22 Up. Can. C. P. 338; *State v. Smith*, 80 Mo. 516; *People v. O'Connell*, 60 Hun (N. Y.), 109; *Uhl v. Com.*, 6 Gratt. (Va.) 706.

⁵⁷ *People v. Lawton*, 56 Barb. (N. Y.) 126.

⁵⁸ *Reg. v. Bain*, 9 Cox C. C. 198.

⁵⁹ *Dugdale v. Reg.*, Dears. C. C. 64.

⁶⁰ *Reg. v. Roberts*, Dears. C. C. 539.

⁶¹ *Griffin v. State*, 26 Ga. 503.

⁵⁰ 2 Pick. (Mass.) 380.

⁵¹ *People v. Randolph*, 2 Park. Cr. Cas. (N. Y.) 174; *Williams v. State*, 14 Ohio, 222, 45 Am. Dec. 536; *Com. v. Green*, 2 Pick. (Mass.) 380.

⁵² *Nugent v. State*, 18 Ala. 521.

⁵³ *Clark's Cr. Law*, 103.

and renting houses for purposes of prostitution,⁶² have been held sufficiently proximate to constitute attempts. On the other hand, it has been held that to procure a gun for the purpose of unlawfully shooting another;⁶³ to endeavor to purchase liquor to be sold contrary to law;⁶⁴ to elope with a relative with the avowed intention of committing an incestuous marriage;⁶⁵ were mere preparations not sufficient to warrant convictions.

3. Following the same principle, it has been laid down that the act must be adapted to the perpetration of the crime intended.⁶⁶ But here, as before, it should be clear enough that this statement ought to be taken as expressing the fact that upon the ground of non-adaptation of the act to the crime, courts have in certain cases exercised their right to interfere with verdicts as being unreasonable. The same explanation applies to the proposition that there can be no crime where the means adopted are obviously unsuitable.⁶⁷ Thus where the accused had presented a pistol at another in a manner in which it could not possibly do an injury, it was held that the jury could not reasonably infer an intent to murder.⁶⁸ From the fact that the means used were obviously unsuitable it ought to be inferred that the accused knew it, and if he did know it the ultimate inference that no criminal intent existed is irresistible.⁶⁹ If the unsuitableness of the means is not obvious then a jury may be warranted in finding the necessary intent, unless it is shown that the accused in fact knew of this defect. Thus, an endeavor to shoot another with an empty gun in the belief that the gun is loaded is a fact from which an intent to kill may reasonably be inferred. Not so, however, if it appears that the gun was known to be empty.⁷⁰ The fact that a person shot at is so far distant that injury is impossible does not conclusively

negative the intent to kill;⁷¹ unless the person shooting is shown to have been aware of this fact, or unless the distance is so great as to be obvious to an ordinary man.⁷² In this view of the principle, the case of *State v. Swails*,⁷³ cannot be reconciled or distinguished. There it appeared that the accused shot at another at a distance of forty feet, both parties believing that the gun was loaded with a deadly charge; but the further fact that the gun was loaded only with powder and a light cotton wad was held a sufficient defense.

4. Consistently with the principle pointed out, it has been held that in an attempt to procure an abortion, the fact that the medicine administered for that purpose was harmless, would not be a conclusive proof of innocence.⁷⁴ And the same is true where poison is administered in a quantity so small or in such form as to be harmless.⁷⁵ It is clearly otherwise, however, if the substances administered are of such a nature that their harmlessness is obvious to an ordinarily reasonable person, although it is not affirmatively shown that this was known to the accused; for his knowledge should in such case be inferred, and the inference of no criminal intent would follow.⁷⁶ The absence of a cap on a gun sought to be fired at a person was properly held not such a fact as would warrant the court in overturning a verdict of guilty.⁷⁷ Yet, had the evidence shown that the accused was aware of this fact, what reasonable man would say that there was an intention to shoot? In a prosecution for an attempt to ravish a child it was held that a verdict of guilty should be sustained although it appeared that the child was in such a position that the accomplishment of the deed was impossible.⁷⁸ Yet, it is easy to conceive of a situation where the deed would be so obviously impossible that the inference of an intent

⁶² *Com. v. Harrington*, 3 Pick. (Mass.) 26; *contra*, *Brockaway v. People*, 2 Hill (N. Y.), 558.

⁶³ *Reg. v. Cheeseman*, 9 Cox C. C. 100; *People v. Murray*, 14 Cal. 159.

⁶⁴ *U. S. v. Stephens*, 8 Sawy. (U. S.) 116.

⁶⁵ *People v. Murray*, 14 Cal. 159.

⁶⁶ *Robinson's Elem. Law*, sec. 472; *Colvin v. State*, 90 N. Car. 717.

⁶⁷ 1 *Bishop's New Cr. Law* (8th Ed.), sec. 754; *Clark's Cr. Law*, p. 109; *Allen v. State*, 28 Ga. 395, 73 Am. Dec. 760; *Smith v. State*, 32 Tex. 593.

⁶⁸ *Tarver v. State*, 43 Ala. 354.

⁶⁹ 9 Cent. L. J. 257; *Reg. v. Lewis*, 9 Car. & P. 523.

⁷⁰ *State v. Shepard*, 10 Iowa, 126; *State v. Cherry*, 11 Ired. (N. Car.) 475; *State v. Smith*, 2 Humph. (Tenn.) 547.

⁷¹ *Kunkle v. State*, 32 Ind. 232; *Hatton v. State*, 31 Tex. Cr. Rep. 586.

⁷² *Henry v. State*, 18 Ohio, 32.

⁷³ 8 Ind. 525, 65 Am. Dec. 772.

⁷⁴ *Rex v. Phillips*, 3 Campb. 73; *Com. v. Morrison*, 16 Gray (Mass.), 224; *U. S. v. Bott*, 11 Blatch. (U. S.) 346.

⁷⁵ *Reg. v. Dale*, 6 Cox C. C. 14; *Reg. v. Cluderoy*, 1 Den. C. C. 514, 2 Car. & K. 297; *State v. Glover*, 37 S. Car. 602.

⁷⁶ *State v. Clarissa*, 11 Ala. 57.

⁷⁷ *Mullen v. State*, 45 Ala. 43, 6 Am. Rep. 691.

⁷⁸ *Com. v. Shaw*, 134 Mass. 221.

to commit the crime would be too absurd to be entertained by any reasoning mind.

5. The non-existence or unsuitability of the object against which the act is directed furnishes many examples of so-called impossible crimes; but they involve no principle different from those we have been discussing. The intention of the accused is in every case the all-important question. In England, in an early case, the accused had attempted to pick the pocket of another but found it empty. It was held that for this reason the crime was impossible and that therefore the offender could not, as matter of law, be convicted of the attempt.⁷⁹ The American courts, however, took from the beginning a different view upon grounds which are fairly stated by Fletcher, J., in *Commonwealth v. McDonald*,⁸⁰ as follows: "To attempt is to make an effort to effect some object, to make a trial or experiment, to endeavor, to use exertion for some purpose. A man may make an attempt, an effort, a trial, to steal, by breaking open a trunk, and be disappointed in not finding the object of pursuit, and so not steal in fact. Still he remains, nevertheless, chargeable with the attempt and with the act done toward the commission of the theft. So a man may make an attempt, an experiment, to pick a pocket, by thrusting his hand into it and not succeed, because there happens to be nothing in the pocket. Still he has clearly made the attempt, and done the act toward the commission of the offense." This reasoning has been adopted or followed by other American courts in cases where the same question arose;⁸¹ and in others involving the same principle, as attempts to steal from any empty safe,⁸² or drawer.⁸³ Recently, the English courts have overruled the older decisions and adopted the same view.⁸⁴ Again, it has been laid down as matter of law that, if there is no person in existence to whose injury the attempt can be consummated, there can be no attempt to commit a

crime; as where a person falsely indorses exchequer bills as if received for customs, the act being calculated to injure no one but the indorser himself;⁸⁵ or, where one endeavors to ravish a dummy or a man dressed as a woman;⁸⁶ or, again, where one shoots at a log or a shadow in an endeavor to kill.⁸⁷ It may be conceded that in the examples given the operation of such a rule of law would work no injustice; and yet, in the light of all the decisions which properly belong to the same class, it is seen that the rule must be either overwhelmed with exceptions or entirely disallowed. The criminal reports abound with cases wherein impossibility for the same reason of the crime attempted is held not to excuse the attempt; as, for instance, attempting to commit abortion upon a woman who is not pregnant;⁸⁸ attempting to defraud one who because of knowledge of the facts could not be deceived;⁸⁹ attempting to extort money from one acting in concert with the police;⁹⁰ shooting into an empty carriage;⁹¹ shooting into a vacant spot recently occupied by a person.⁹² On the other hand it has been held, in a prosecution for an attempt to rob, that the accused could not be found guilty, it appearing that he had attacked another but knew that such other had no money or property on or about his person.⁹³ Is such a rule of law expedient? Overruling necessity is believed to be its only justification. Such is the only support which can be invoked by any rule which is not universal; certainly no other authority will support one which is irrational. It is not supported by necessity if the same result may be reached (as it may be here), in a simple, logical and practical manner, without the aid of any rule of law applicable distinctively to impossible crimes. A recurrence to the principles already discussed will indicate the test we would suggest. It is based upon

⁷⁹ *Rex v. Knight*, 1 Salk. 374.

⁸⁰ Dictum in *People v. Gardner*, 25 N. Y. Supp. 1072.

⁸¹ Dictum in *Reg. v. McPherson*, Dears. & B. Cr. Cas. 201.

⁸² *Reg. v. Goodchild*, 2 Car. & K. 293; *State v. Howard*, 32 Vt. 380; *Com. v. Taylor*, 132 Mass. 261; *Lamb v. State*, 67 Md. 524.

⁸³ *Rex v. Holden*, R. & R. C. C. 154; *Com. v. Starr*, 4 Allen (Mass.), 301.

⁸⁴ *People v. Gardner*, 144 N. Y. 119, 43 Am. St. Rep. 741.

⁸⁵ 1 Wharton, Cr. Law, sec. 186; *Clark's Cr. Law* 110.

⁸⁶ *People v. Lee Kong*, 95 Cal. 666.

⁸⁷ *Rex v. Edwards*, 6 Car. & P. 515.

⁷⁹ *Reg. v. Collins*, L. & C. 471, 9 Cox C. C. 497; *Reg. v. Dodd*, cited in *Reg. v. Brown*, 24 Q. B. Div. 350.

⁸⁰ 5 Cush. (Mass.) 365.

⁸¹ *State v. Wilson*, 30 Conn. 507; *Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22; *People v. Jones*, 46 Mich. 441; *People v. Moran*, 123 N. Y. 254; *Rogers v. Com.*, 5 S. & R. (Pa.) 463.

⁸² *Harwick v. State*, 49 Ark. 514; *State v. Beal*, 37 Ohio St. 108, 41 Am. Rep. 490.

⁸³ *Clark v. State*, 86 Tenn. 511.

⁸⁴ *Reg. v. Brown*, L. R. 24 Q. B. Div. 359, 16 Cox C. C. 715; *Reg. v. Ring*, 66 L. T. 300.

the fundamental conception that, with respect to attempts to commit impossible crimes, there is no rule of law,—no conclusive presumption,—one way or the other, merely because of the impossibility; but that in every case the question to be solved is one of fact, *i. e.*, the state of mind of the accused,—the existence or non-existence of a specific intent to commit a particular crime. Clearly, this is a question for the jury; and their decision the court may set aside if it be against the prisoner and unreasonable. In the exercise of this supervisory power the only rules which a court can safely apply are the rules of logic; the ultimate question being, is the verdict supported by the evidence,—is it one that a jury of ordinary men could reasonably render? For the decision of this question in cases of attempts to commit impossible crimes we believe the only logical test to be this: If the evidence shows that the crime was impossible and that this impossibility was known to the accused, a conviction cannot be sustained; for no jury could reasonably find that in such a case there existed an intent to commit the crime. The question of knowledge of the impossibility in the mind of the accused, upon which the necessary intent depends, is a subsidiary one to be decided upon evidence probative of that fact. From the fact that a crime was to the ordinary person obviously impossible the inference of knowledge is unavoidable; and, from knowledge of the impossibility, the absence of a specific criminal intent is undeniably evinced. To return to the examples which have been given as establishing the rule of law: The case of the false indorsement may be regarded as of extremely doubtful authority; for it does not appear that the accused knew that the indorsement would injure no one. True, if this fact had been obvious, the inference of knowledge must have followed. That it was obvious must be assumed, else the decision cannot be supported on any logical ground.⁹⁴ In the instance of the attempt to ravish the dummy or a man dressed as a woman (an imaginary though a favorite example of text-writers), our test applies with equal certainty. If it is urged that here it should be assumed that the accused thought he was assaulting a woman, we answer that such an assumption is unwar-

ranted. No jury of ordinary men could reasonably find beyond a reasonable doubt that the accused thought the object was a woman. The fact that it was no woman would have been obvious to the ordinary man; and, judging the accused by the standard or ordinary men, would not this raise a reasonable doubt as to the intent? A verdict of guilty in defiance of this conclusion would therefore be set aside as unreasonable; or, if the practice of the particular court permitted, a verdict of acquittal would be directed. The certainty of our test is even more surely demonstrated by a consideration of the attempt to kill by shooting at a log or shadow,—another instance of imaginative text writers. Here the absolute rule of law would sometimes prove unsatisfactory, for the reason that the fact that the object shot at is not a person may not in some cases be the controlling fact to show the intent. Should it appear that no person was or had been recently in the vicinity, the mere fact of the inanimate object, being obvious to the ordinary man, would evince the fact that the accused knew it (or, at least, would raise a reasonable doubt as to his knowledge), as a matter of logic and not of law. If, however, it should appear that a person whom the accused had a motive in shooting had but recently occupied the position of the log or shadow, or one near to it, the accused as an ordinary man might well have believed that he was shooting at such person; and if from all the evidence the jury should believe the latter hypothesis and in consequence return a verdict of guilty, it would be a reasonable verdict with which the court could not justly interfere.⁹⁵

FRANCIS J. KEARFUL.

⁹⁵ See *People v. Lee Kong*, 95 Cal. 666.

PARTNERSHIP—EXEMPTION.

PORCH V. ARKANSAS MILLING CO.

Supreme Court of Arkansas, February 5, 1898.

Partners cannot, during the continuance of the partnership, claim an individual exemption in the firm property, under Const. art. 9, §§ 1, 2, and Sand. & H. Dig. § 3716, providing that certain personal property of a head of a family, "in specific articles to be selected" by him, shall be exempt.

Bunn, C. J., and Battle, J., dissent.

HUGHES, J.: The precise question in this case has not been decided in this court. Following the decided weight of authority, it is held in Rich-

⁹⁴ See *Reg. v. Nash*, 2 Den. C. C. 493; *Reg. v. Marcus*, 2 Car. & K. 356; *Barnum v. State*, 15 Ohio, 717.

ardson v. Adler, 46 Ark. 48, that "the members of an insolvent firm are not entitled to the exemptions allowed by law, out of the partnership property, after it has been seized to satisfy the demands of the creditors of the firm." The court said: "The interest of each partner in the partnership assets is his portion of the residue after all the liabilities of the firm are liquidated and discharged. Property belonging to the firm cannot be said to belong to either partner as his separate property. It is contingent and uncertain whether any of it will belong to him on the winding up of the business, and the settlement of his accounts with the firm. Joint property is deemed a trust fund primarily to be applied to the discharge of partnership debts, against all persons not having a higher equity;" citing *Pond v. Kimbal*, 101 Mass. 105; *Gaylord v. Imhoff*, 26 Ohio St. 317; *Giovanni v. Bank*, 55 Ala. 305; *In re Handlin*, 3 Dill. 290, Fed. Cas. No. 6018. As affecting the question involved, the statute of Ohio exempting personal property is substantially like ours, which provides that "the personal property of any resident of this State, who is married or the head of a family, in specific articles to be selected by such resident not exceeding in value the sum of five hundred dollars, in addition to his or her wearing apparel and that of his or her family, shall be exempt from seizure on attachment, or sale on execution, or other process from any court, on debt by contract." Sand. & H. Dig. § 3716; Const. art. 9, §§ 1, 2. In the case at bar the appellant filed no schedule claiming his exemption in specific articles. In the opinion in *Gaylord v. Imhoff*, the Ohio Supreme Court said: "Looking alone to the language of the section above quoted, we find nothing to justify the inference that the legislature, in passing it, was intending to provide for other than individual debtors; and for the exemption of their individual property from sale on execution; and when construed in connection with the law relating to partnerships, as it had always stood and still stands, we are convinced that it could not have been the intention of the lawmaker to bring partners or partnership property within the operation of the section in any respect. Dealing with the statutory right, and excluding equitable considerations, which have no place here, our convictions are based upon the fact that the right of exemption, and the mode of exercising it prescribed by the statute, are wholly inapplicable to a partnership, or the rights of the partners therein, and inconsistent with the rights of their creditors in relation thereto. The language of the section points unmistakably to property owned individually. The selection of the exempted property is to be made by the execution debtor, and the property selected is to be appraised and set off to the debtor. Partners are joint tenants in their stock in trade, * * * and no partner has an exclusive right to the joint stock. 3 Kent, Comm. 37." It will be seen by examination of this opinion of the Ohio court and the case of

Richardson v. Adler, 46 Ark. 43, that Judge Smith, who delivered the opinion in the latter case, adopts and relies upon the reasoning and the principles laid down in the Ohio case. It seems to us that the reasoning in those cases applies to the case at bar with as much force as it does to those cases. We think the doctrine sound, and supported by the weight of authority. In the case of *McCoy v. Brennan*, 61 Mich. 362, 28 N. W. Rep. 129, it is held that partners can, during the existence of the partnership, claim an individual exemption in partnership property, when taken under legal process for partnership debts. The same is held in *Chipman v. Kellogg*, 60 Mich. 438, 27 N. W. Rep. 592. Some other States hold the same. The idea advanced to support, in part, these cases, is that the exemption statutes should receive a liberal construction in harmony with their humane purpose. Such cases are *Stewart v. Brown*, 37 N. Y. 350; *Blanchard v. Paschal*, 68 Ga. 32; *Servant v. Lusk*, 43 Cal. 238. In opposition to the doctrine of these cases, the weight of authority sustains the rule that partners cannot, during the continuance of the partnership, claim an individual exemption in the partnership property. *Giovanni v. Bank*, 55 Ala. 305; *Bonsall v. Comly*, 44 Pa. St. 442; *Guptil v. McFee*, 9 Kan. 30; *Baker v. Sheehan*, 29 Minn. 235, 12 N. W. Rep. 704; *Prosser v. Hartley*, 35 Minn. 340, 29 N. W. Rep. 156; *State v. Bowden*, 18 Fla. 17; *State v. Spencer*, 64 Mo. 355; *Richardson v. Adler*, 46 Ark. 43; *Wise v. Frey*, 7 Neb. 134; *Gaylord v. Imhoff*, 26 Ohio St. 317; *White v. Heffner*, 30 La. Ann. 1280; *In re Handlin*, 3 Dill. 290, Fed. Cas. No. 6018; *Pond v. Kimbal*, 101 Mass. 105. The rule is said to rest upon the principle, well recognized in the decisions, that the title and ownership of partnership property are in the partnership, and neither partner has any exclusive right to any part of it. Our constitution and statute provide that the debtor shall be entitled to claim his exemption in specific articles, to be selected by him. As we have seen, this he cannot do while the partnership continues, as the property does not belong to him individually. When the debts of the partnership are paid, if any surplus of partnership property remains he can claim his exemption in his part of this surplus. Had he asked that the creditors be brought in, and the partnership debts be settled, and account be had between him and his co-partner, and his interest in the surplus, after paying the debts of the partnership, ascertained, it is probable that the court should have done this. The cases in our court to the effect that the debtor claiming exemption must claim specific articles are numerous. The burden to show that property, claimed as exempt, is exempt, is upon the claimant. He must bring himself strictly within the statute. The judgment is affirmed.

NOTE.—The strong dissenting opinion of two of the judges of the court in the principal case reveals that the question at issue is not without difficulty. *Battle, J.*, in the course of the dissenting opinion lays down

the proposition that a partner is entitled to hold, exempt from sale under an execution issued on a judgment against him for a debt owing by him individually, so much of his interest in the assets of a partnership as is equal in value to the exemptions from sale under process allowed him by law:

"A partner has no specific interest in any particular chattel, or asset, or part of the property of the firm. His only interest is in a proper proportion of the surplus of the whole after payment of debts, including the amounts due the other partners." *Richardson v. Adler*, 46 Ark. 43, 48; *Giovanni v. Bank*, 55 Ala. 305, 310; 1 *Bates*, Part. § 180; 1 *Lindl. Part.* (2d Ed.) *339, *340; 1 *Freem. Ex'ns* (2d Ed.), p. 298, § 125.

"No private creditor of a partner can take by his execution anything more than that partner's share in whatever surplus remains after the partnership effects have paid the partnership debts." *Gaylord v. Imhoff*, 26 Ohio St. 317, 324; *Harris v. Phillips*, 49 Ark. 58, 59, 4 S. W. Rep. 196; 2 *Freem. Ex'ns* (2d Ed.), p. 809, § 254a.

"The debtor's right to claim his exemption is co-extensive with the creditor's right to seize and sell under his execution, except in the cases specifically excepted from the operation of the law." *Sannomer v. King*, 49 Ark. 299, 302, 5 S. W. Rep. 327, 328.

Mr. Freeman says: "That the property of a co-tenant may be exempt from execution ought not to admit of doubt. If the circumstances are such as would entitle him to exempt the whole chattel, were he the owner thereof, they must, upon principle, be potent to exempt his moiety. The object of the exemption law was, not to exempt estates in severalty merely, but to make some provision for the better maintenance of persons in humble circumstances. If such a person owns but half a cow or a horse, that much is as much within the letter and the spirit of the exemption laws as the whole would be." 1 *Freem. Ex'ns*, pp. 670, 671, § 221.

The Arkansas statutes, the dissenting judges claim, are almost copies of sections 3287-3292 of the Revision of Iowa of 1860, the difference in no wise affecting the sense or effect. In construing the Iowa statutes, in *Richards v. Haines*, 30 Iowa, 574, Mr. Justice Beck, speaking for the court, said: "These statutory provisions in no manner affect the rights of the partners or the creditor. They simply provide for the manner of the enforcement of a remedy before secured by the law against a partner for his separate debt. No relief can be given the creditor, in the equitable action provided for, other or different than he would have been entitled to in such an action, before the statute, prosecuted by himself in a proper case, or by the partner of his debtor, or by the debtor himself, when either could resort to a court of chancery to settle their respective interests, in a case where the debtor partner's interest is taken on an execution against him. The questions to be determined, and the relief to be granted in the equitable action, contemplated by the statute above cited, are those that relate to the interest of the debtor partner in the property seized upon execution, and the satisfaction, in a way authorized by the law, of the judgment by the sale of such property. By the proceeding the interest of the debtor partner in the property levied upon must be determined. His interest is measured by the rights of his co-partner, who has a lien upon the property for the amount of his share, and for moneys advanced by him beyond it for the use of the firm. *Pierce v. Wilson*, 2 Iowa, 20. His interest is also dependent upon the rights of the creditors of the firm, for they are entitled to be first paid from the partnership funds. *Pierce v.*

Wilson, *supra*; *Hubbard v. Curtis*, 8 Iowa, 1. The interest of the debtor partner can only be ascertained by determining the rights of the co-partner and the indebtedness of the firm, which, it is evident, must be done in this proceeding. This, in the case of a levy of an execution against the debtor partner upon the firm property, is within the ordinary jurisdiction of equity, which is necessary to be exercised for the protection of all parties concerned,—the creditors, the partners, and the purchasers upon the execution. 1 *Story*, Eq. Jur. § 678. "In this proceeding it is very clear that the court must, in order to determine the interest of the debtor partner, ascertain the interest and claims of his co-partner, and the indebtedness of the firm, and, in order to do so, may require necessary parties to be brought in and answer in the proceeding. Having acquired jurisdiction of the matters involved and of the persons interested, in order to avoid multiplicity of suits, the court may proceed, after having declared the interest of the debtor partner, to grant full relief to all parties by declaring and enforcing their respective rights. It may direct the sale of the property levied upon, and enforce the delivery of its possession to the officer. The interest to be acquired by the purchaser may be determined, and all other matters settled, to the end that justice may be done and future suits prevented. In cases demanding it, the partnership may be fully settled and wound up, though this may not be necessary in all cases. In short, the court is authorized to ascertain the rights of all the parties interested, and, by its decree, do justice between them."

Under the statute the interest of the debtor partner cannot be sold until it is ascertained and fixed by equitable proceedings. In this proceeding his interest can be separated from the partnership assets, and it is the duty of the court to do so when the rights of any of the parties demand it; and especially is this the case when it becomes necessary to carry into effect the humane and remedial purposes of the law upon exemptions. Why should it not set apart to him his interest, so that he can select out of it the exemptions allowed him by law? The design of this law was to shield the poor, and not to strip them. Should the court refuse to protect the debtor partner when it is in its power to do so? He has a right to his exemptions. Having the right, he is entitled to the enforcement of it; and, being entitled to the enforcement of it, it is the duty of the court to grant him the relief."

BOOK REVIEWS.

ESTEES' PLEADING AND PRACTICE.

This is the fourth edition of a well known and sterling treatise. The third edition appeared in the year, 1885, and in view of the fact, that during that period of time Codes of Procedure in the several States have undergone many material alterations by way of amendments, and a vast number of judicial decisions have accumulated upon the subject of Code practice, will render this edition of timely value. It seems to us unnecessary to go into the general merits of the treatise. It is sufficient to say that since the first appearance of the work in 1869, it has been found by the profession to be accurate, comprehensive and philosophical. Each edition has strengthened its hold upon the legal fraternity. In this edition, though the original plan of the work has not been changed, much new matter and a large number of cases have been added by the

editor, Charles T. Boone, of the San Francisco Bar. It is in three large volumes beautifully printed and bound and has a first-class index. It is published by Bancroft, Whitney Co., San Francisco.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

ARKANSAS.....	148, 177, 181
CALIFORNIA.....	188
COLORADO.....	25, 108
CONNECTICUT.....	9, 151
GEORGIA, 1, 8, 24, 28, 29, 31, 38, 49, 52, 54, 61, 63, 67, 69, 72, 74, 76, 77, 80, 94, 95, 103, 105, 114, 116, 117, 122, 128, 132, 135, 136, 142, 150, 153, 162, 167, 168, 175, 186, 191, 195, 220, 221	
ILLINOIS.....	10, 12, 20, 68, 152, 154, 217
INDIANA.....	2, 4, 13, 14, 18, 30, 57, 119, 149, 224
INDIAN TERRITORY.....	75, 109, 172, 201
KANSAS.....	26
KENTUCKY, 17, 19, 23, 39, 83, 84, 100, 101, 106, 107, 111, 124, 126, 147, 163, 171, 188, 203, 204, 222, 225	
LOUISIANA.....	32, 73, 87, 133, 140, 169
MAINE.....	86, 159
MARYLAND.....	42, 47, 192, 212
MASSACHUSETTS.....	35, 43, 46, 53, 110, 144, 158, 192, 218, 214
MICHIGAN.....	11, 33, 180, 207
MISSISSIPPI.....	7, 58, 82, 174, 178, 179
MISSOURI.....	99
MONTANA.....	84
NEBRASKA.....	21, 64, 91, 189
NEVADA.....	143
NEW HAMPSHIRE.....	15, 22, 66, 127
NEW JERSEY.....	37, 112, 146, 156, 180
NEW YORK.....	81, 96, 164
NORTH CAROLINA.....	6, 44, 92, 93, 123, 181, 187, 211
PENNSYLVANIA.....	85, 134, 137, 193, 198, 210, 215, 216
RHODE ISLAND.....	176, 196, 208, 218
SOUTH CAROLINA, 27, 40, 56, 96, 113, 120, 129, 145, 166, 170, 199, 200	
TEXAS.....	3, 5, 62, 63, 70, 78, 79, 104, 115, 125, 185, 205
UNITED STATES C. C., 45, 49, 51, 89, 102, 161, 184, 187, 194, 202, 209	
UNITED STATES C. C. OF APP., 16, 41, 50, 55, 90, 98, 121, 138, 141, 155, 160, 173, 190, 223	
UNITED STATES D. C.....	97, 219
UTAH.....	139
WEST VIRGINIA.....	59, 71, 89, 118, 165, 197
WISCONSIN.....	60, 206

1. ACCORD AND SATISFACTION—Pleading and Proof.—A receipt for a given sum of money from one of two wrongdoers jointly used, "in full settlement for all damages or injuries sustained or suffered by me, or that may result to me by reason of my falling into the excavation," etc., when unexplained, is evidence of a satisfaction for all injuries so sustained, and will operate to discharge, not only the one making payment, but the other; and where the two were jointly sued for the same negligent act, and the action was dismissed as to one of them, it was error, in the trial against the other, to charge that the jury could only consider the receipt in the nature of an admission as to the extent of the injury.—DONALDSON V. CARMICHAEL, Ga., 29 S. E. Rep. 135.

2. ADMINISTRATION—Executors and Administrators—Sales.—Under Burns' Rev. St. 1894, § 2504 (Horner's Rev. St. 1897, § 2349), providing that, when the widow's interest in the husband's realty is liable to sale to satisfy a lien, the court may direct the sale of the whole of the land, including her interest, to discharge such lien, and order payment to her of her share, or such part of her share of the gross proceeds as remain after satisfying such lien, the court cannot subject any portion of the widow's share of the proceeds to the payment of decedent's debts or expenses of administration.—LEWIS V. WATKINS, Ind., 49 N. E. Rep. 944.

3. ADVERSE POSSESSION.—Where a vendee went into possession with the understanding that a vendor's lien on the land in favor of an estate was released, and he and his successors continued in possession for 15 years, under an open and notorious claim of title, such possession is sufficient to constitute title by limitation against the heirs of the estate who were non-residents and unknown.—SMITH V. PATE, Tex., 45 S. W. Rep. 6.

4. APPEAL—Appealable Orders—Default Judgment.—An order vacating a judgment by default is not a final judgment, within Burns' Rev. St. 1894, § 644, (Horner's Rev. St. 1897, § 632), authorizing appeals from such judgments.—MASTER V. INDIANA CAR & FOUNDRY CO., Ind., 49 N. E. Rep. 981.

5. APPEAL FROM JUSTICE'S COURT—Bond.—On appeal from justice's court, a bond signed by one of several appellants and the sureties, or by the sureties only, is good.—PRYOR V. JOHNSON, Tex., 45 S. W. Rep. 39.

6. APPLICATION OF PAYMENTS—Plaintiff took a mortgage on crops to secure advances, and thereafter made further advances, under an agreement that the crops should be given to him, and first applied to the unsecured account. A running account was kept, showing the debits and credits: Held that, when payments from the crops equaled the amount secured by the mortgage lien, it was not discharged thereby.—MILLER V. WOMBLE, N. Car., 29 S. E. Rep. 102.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignment for the benefit of creditors, although preferring some, which conveys all assignors' lands, goods, and chattels, choses in action, bills, bonds, notes, books of account, etc., and all other property of every nature and description, except exemptions, is a general assignment.—TISHOMINGO SAV. INST. V. ALLEN, Miss., 23 South. Rep. 303.

8. ASSIGNMENT OF JUDGMENT—"Without Recourse."—The words "without recourse" have no fixed legal significance, when employed in the assignment of instruments other than negotiable promissory notes and bills of exchange, and therefore the assignment of a judgment by the plaintiff passes to the assignee the title to it, with all its resulting incidents, including the right to stand in the creditor's place, as regards the means of its collection and enforcement, together with any incidental rights or advantages existing at the time, notwithstanding the fact that, in the written assignment of the judgment, such assignment is stated to be "without recourse."—THOMPSON V. FIRST STATE BANK, Ga., 29 S. E. Rep. 610.

9. ASSUMPSIT—Action on Account.—In an action for clothes "furnished to the defendant and his sons," plaintiff may recover for clothes furnished another besides his sons on his written order.—MCKEON V. BRINGTON, Conn., 39 Atl. Rep. 533.

10. ASSUMPSIT—Quantum Meruit.—In *assumpsit* on the common counts, a charge that if the evidence as to a verbal contract between the parties is so conflicting that its exact terms cannot be ascertained, the testimony as to the value of the services might be considered as bearing on the reasonableness of the statements of the parties, for the purpose of determining the true contract, was erroneous.—PEOPLE'S CASUALTY CLAIM ADJUSTMENT CO. V. DARROW, Ill., 49 N. E. Rep. 1005.

11. **ATTACHMENT—Dissolution—Grounds.**—A defense which would be effective on the trial of an action of attachment cannot be made by a motion to quash the proceedings, based on the merits, even if it be accompanied by a stipulation of the facts.—*S. K. MARTIN LUMBER CO. v. MENOMINEE CIRCUIT JUDGE*, Mich., 74 N. W. Rep. 649.

12. **ATTORNEY AND CLIENT—Relationship.**—Where the attorney for plaintiff in divorce, after entry of the decree, and before the rendition of his statement of account for costs and disbursements, procures the mutual execution of deeds between the parties, to effectuate the terms of the decree, the relation of attorney and client exists when the deeds are executed.—*WILLIN v. BURDETT*, Ill., 49 N. E. Rep. 1000.

13. **ATTORNEY AND CLIENT—Services Procured by Attorney.**—A court reporter employed by an attorney to furnish longhand copies of the evidence adduced at the trial may recover the value of the services from the client where they were used from day to day during the trial, in his presence, and for his benefit.—*PALMER v. MILLER*, Ind., 49 N. E. Rep. 975.

14. **AWARD—Action—Complaint.**—A complaint, in an action on a common law award, setting forth the differences between the parties, the agreement to arbitrate, the fact that the award was made, the substance of the verbal report of the arbitrator, and the failure of defendant to abide by such award, states a cause of action; and it is immaterial that the arbitrator, a long time after his oral report (which was permissible under the agreement), submitted a written report embodying the same finding.—*MAUD v. PATTERSON*, Ind., 49 N. E. Rep. 974.

15. **BAILEMENT—Gratuitous Bailor—Liabilities.**—A gratuitous tender of a chattel is not liable for an injury to the servant of the borrower from defects therein not known to the lender, even though he ought to have known of them.—*GAGNON v. DANA*, N. H., 39 Atl. Rep. 992.

16. **BILLS AND NOTES—Accommodation Paper.**—It is no defense against one who has acquired accommodation paper, with knowledge of its character, but in good faith, in the ordinary course of business, and for value, that the accommodation maker actually received no consideration for it.—*GREENWAY v. WILLIAM D. ORTHWEIN GRAIN CO.*, U. S. C. C. of App., Eighth Circuit, 85 Fed. Rep. 536.

17. **BILLS AND NOTES—Assignment.**—Where defendant, being indebted, drew a bill of exchange, payable to himself or his creditor, to be used to raise funds for the latter's benefit, and the latter assigns it to a *bona fide* holder, the maker cannot, in an action by such holder, set up any equities thereafter arising in his favor between him and his original creditor.—*BANK OF MARTIN v. CASSEDY*, Ky., 45 S. W. Rep. 110.

18. **BILLS AND NOTES—Collateral Security.**—A firm executed several notes to a bank, and secured them by collateral, with the right to substitute other collateral. The bank, to escape indorsing one of the notes, which it desired to sell, had the firm execute a new note to its own order, and indorse the same to the bank, which took it in payment of the first note. The bank then sold the second note, and the purchaser took it with knowledge of the transaction whereby the bank had escaped indorsing it, and with the agreement that it was secured by the collateral. At the maturity of the note, it was renewed, and made payable to the purchaser: Held, that the purchaser had a lien on the collateral security in the hands of the bank.—*HAWKINS v. FOURTH NAT. BANK OF NEW YORK*, Ind., 49 N. E. Rep. 997.

19. **BILLS AND NOTES—Consideration—Trust Estates.**—In an action on a note against a *cestui que trust*, the trustee may be joined as party defendant to subject the trust estate to the payment of the claim, though the obligation evidenced by the note was created prior to the trust estate, which is held for the support of the *cestui que trust*, as Ky. St. § 2835, makes a trust estate liable for the *cestui que trust's* debts as it would be did

he hold it in his own name.—*HANCOCK v. TWYMAN*, Ky., 45 S. W. Rep. 68.

20. **BILLS AND NOTES—By Officers of Corporation.**—The president and secretary of a corporation signed their individual names and titles of office to a note reciting, "we promise to pay," and gave it to the payee, who advanced money thereon in the belief that the said officers were personally liable: Held, that they were personally liable.—*HACKEMACK v. WIEBROCK*, Ill., 49 N. E. Rep. 984.

21. **BILLS AND NOTES—Pleading.**—A petition in a suit upon a promissory note, made a part of the petition, which alleges that the defendant executed and delivered the note to the plaintiff, that such note is wholly due and payable, and the defendant wholly neglects to pay the same or any part thereof, states a cause of action.—*HARTZELL v. MCCLURG*, Neb., 74 N. W. Rep. 628.

22. **BILLS AND NOTES—Premature Action on Note.**—An action on a note stipulating for payment "on demand, with interest, after six months, giving said bank (the payee) the right of collecting the whole or any part of this note, at their own discretion, or of extending from time to time, by reception of interest in advance, or otherwise, the payment of the whole or any part," brought before the time to which the note had been extended, is not premature.—*CONWAY SAV. BANK v. DOW*, N. H., 39 Atl. Rep. 975.

23. **BONDS—Execution—Burden of Proof.**—The burden of proving the signature or mark of obligors on a bond is on the obligee.—*COMMONWEALTH v. CAMPBELL*, Ky., 45 S. W. Rep. 89.

24. **BOND—Indemnity—Construction.**—Where several persons undertake in writing to procure the release of another person from a bond upon which he had become jointly and severally liable with others, or "to save him harmless on account of that bond," the persons so undertaking are liable to the person with whom they thus contract for any damages he may lawfully sustain by reason of his having signed such bond.—*ENGLISH v. GRANT*, Ga., 29 S. E. Rep. 187.

25. **BONDS—Public Works—Actions.**—The people may sue on a contractor's bond running to the people, and conditioned for the payment by the contractor of all charges made against him in the construction of a certain public work, to recover an amount due materialmen.—*PEOPLE v. DODGE*, Colo., 52 Pac. Rep. 687.

26. **BUILDING AND LOAN ASSOCIATIONS—Cancellation of Instruments.**—Where a borrowing member of a building and loan association, whose loan was to be repaid by maturing stock, made all his payments, and surrendered his stock certificate at maturity, he was entitled to cancellation of the note and mortgage.—*PIONEER SAV. & LOAN CO. v. KASPER*, Kan., 52 Pac. Rep. 628.

27. **BUILDING AND LOAN ASSOCIATIONS—Loans—Lex Locii.**—A contract to pay money borrowed of a building and loan association incorporated in a foreign State is one to be performed in such State, where the borrower has his option to send his payments to the association in such State, or make them at a local office, so long as the association sees fit to maintain it, with the understanding that the local agents are his agents.—*POLLOCK v. CAROLINA INTERSTATE BUILD. & L. ASSN.*, S. Car., 29 S. E. Rep. 77.

28. **BUILDING ASSOCIATION—Estoppel—Usury.**—One who borrows money from a building and loan association cannot set up, in defense to an action for the recovery of the same, that the loan was made in disregard of a by-law prohibiting the making of loans to any persons other than those who have been members of the association for a stated period. Whatever may be the object of such a by-law, one who obtains a benefit from a violation of it is estopped from taking any advantage of the fact that such violation occurred.—*REYNOLDS v. GEORGIA STATE BUILD. & L. ASSN.*, Ga., 29 S. E. Rep. 187.

29. **CARRIERS—Actions—Contract or Tort.**—A petition against a railroad company for damages alleged to have been occasioned to the plaintiff by wrongfully

carrying her past the station to which she had purchased a ticket should, though it sets forth in general terms a contract of carriage, and alleges facts showing a breach thereof, be treated as an action *ex delicto*, when it is manifest from the allegations and prayers of the petition, taken all together, that the plaintiff is seeking a recovery because of the defendant's breach of duty, and not on account of its breach of the contract.—SEALS V. AUGUSTA SOUTHERN R. CO., Ga., 29 S. E. Rep. 116.

30. CARRIERS OF GOODS—Action for Loss of Goods.—In an action against a carrier operating certain steamboats, plaintiff alleged delivery of goods to defendant to be transported to M, and a receipt of a bill of lading conditioned for carriage on the steamboat S, and excepting liability for loss from fire, and that the goods were put on the steamboat C, and burned with the boat: Held, that it was no defense that said boats left for M on alternate days; that it had been the custom of defendant to receive freight for the first boat to leave port for proper destination; that on the day said goods were delivered to defendant, together with a bill of lading for the S, the C was in port taking freight for M: that in accordance with said usage, which was well known to shippers, said goods were placed on board the C, and were burned with the boat.—LOUISVILLE & C. PACKET CO. V. ROGERS, Ind., 49 N. E. Rep. 970.

31. CARRIERS OF PASSENGERS—Assault on Passenger.—A railroad company is liable in damages to a female for an assault with intent to commit a rape upon her person by one employed by such railroad company as a baggage master upon a train on which such female is at the time being conveyed as a passenger.—SAVANNAH, F. & W. RY. CO. V. QUO, Ga., 29 S. E. Rep. 607.

32. CERTIORARI—When Lies.—The preponderance of authority establishes that *certiorari* lies if notice is not given to parties before adjudicating upon their rights.—STATE V. REID, La., 23 South. Rep. 333.

33. CHATTEL DEED OF TRUST—Contribution by Mortgagees.—A mortgage was executed to a trustee to secure creditors of the mortgagor and also a surety on debts due other creditors. Defendants purchased the property with consent of the surety, and with knowledge of the other creditor's rights under the mortgage, and gave creditors their notes, which were afterwards paid, for the amount of their claims. The payment of these claims exhausted the purchase price. The creditors, to whom the surety had become obligated, were subrogated to his rights under the mortgage, and obtained a decree against the defendants for a share of the price which the surety was entitled to under the mortgage: Held, that defendants were not entitled in that suit to a decree requiring the creditors, whom they had paid in full, to return what they had received over their *pro rata* share under the mortgage, and that the decree, made without prejudice to their rights to sue at law for such difference, was all they were entitled to.—UNION NAT. BANK V. RICH, Mich., 74 N. W. Rep. 659.

34. CHATTEL MORTGAGES—Affidavit for Renewal.—The affidavit by filing which a chattel mortgage may be renewed (Comp. St. 1887, div. 5, § 1542) is required to state the time to which the debt, not the mortgage, is extended, the provision being that it state "the amount of the debt justly owing at the time of filing such affidavit or the conditions of the obligation unfulfilled (and), the time to which the same is extended."—COPE V. MINNESOTA TYPE-FOUNDRY CO., Mont., 52 Pac. Rep. 617.

35. CHATTEL MORTGAGES—Attachment—Demand.—Under Pub. St. ch. 161, § 75, providing that on attachment of mortgaged personal property the mortgagee "shall, when demanding payment of money due to him, state in writing a just and true account of the debt or demand for which the property is liable to him, and deliver it to the attaching creditor or officer," a demand which does not state when or by whom the property was mortgaged, nor where the mortgage or record of it may be found, nor state the amount then

due, is insufficient.—CAMPBELL V. EASTMAN, Mass., 49 N. E. Rep. 914.

36. CHATTEL MORTGAGE—Description—Date.—A mortgage of chattels, described as in a store, covers only such property as was in the store at the date of the mortgage, although the mortgage may be actually executed at a later day. The date given becomes a part of the description of the property.—SNOW V. ULMER, Me., 39 Atl. Rep. 993.

37. CHATTEL MORTGAGE—Failure to Record—Assignment.—A chattel mortgage not recorded in the clerk's office of the county in which the mortgagor resided at the time of its execution, and a sale made under it by the mortgagee, are void as against the creditors of the mortgagor.—BLEAKLEY V. NELSON, N. J., 39 Atl. Rep. 912.

38. CONSTITUTIONAL LAW—Contracts—Turnpike Companies.—A turnpike company chartered by the laws of the State is subject to general police regulations prescribed by the legislature; and a statute enacted after the grant of such charter, providing a remedy by proceedings for damages or to forfeit the charter on account of a failure of the company to discharge its obligation to the public, does not impair the obligation of any contract, provided such act does not materially abridge the rights of the company or increase its burdens.—DAVIS V. VERNON SHELL-ROAD CO., Ga., 29 S. E. Rep. 475.

39. CONSTITUTIONAL LAW—Police Power—Vehicle Tax.—Ky. St. § 8011, conferring on cities power to impose licenses on vehicles run therein, is a valid exercise of police power.—BOWSER V. THOMPSON, Ky., 45 S. W. Rep. 73.

40. CONSTITUTIONAL LAW—Retroactive Provisions—Homestead.—Const. art. 3, § 28, provides that no waiver shall defeat the right of homestead before assignment, except it be by deed or mortgage, and only as against the mortgage debt, and no creditor whose lien does not bind the homestead shall have any right or equity to require that a lien which embraces the homestead and other property shall first exhaust the homestead. Article 17, § 11, provides that all laws which are inconsistent with this constitution shall cease on its adoption, and that all actions, except as herein otherwise provided, shall continue and remain unaffected by the adoption of this constitution: Held, that section 28 is not retroactive.—BANK OF ORANGEBURG V. KOHN, S. C., 29 S. E. Rep. 626.

41. CONFLICT OF LAWS—Assignment for Benefit of Creditors.—An assignment for benefit of creditors, made by one residing in Iowa, is governed, as to property located in Kansas, by the Kansas voluntary assignment law, prescribing the manner of registration and the effect thereof as notice.—PARKER V. BROWN, U. S. C. C. of App., Eighth Circuit, 55 Fed. Rep. 595.

42. CONTRACTS—Construction—Money Received.—Where an agreement provided that nothing therein should be understood as fixing on one party any individual liability, beyond the application of certain property for such debts as might be due the other party, such restrictions cannot be extended to a debt which the agreement declares to be due to others.—SKINNER V. GAITHER, Md., 39 Atl. Rep. 876.

43. CONTRACT—Counties—Acceptance of Proposals.—Where county commissioners advertise for proposals for work, and one is submitted, the commissioners, by their vote accepting it and awarding the contract, do not agree to enter into a contract for the work; a formal written contract, to be executed after notification of the award, being provided for in the advertise ment, and referred to in the vote, though the advertise ment required bidders, under penalty, to stand by their proposals.—EDGE MOOR BRIDGE WORKS V. INHABITANTS OF BRISTOL COUNTY, Mass., 49 N. E. Rep. 918.

44. CONTRACTS—Damages.—In an action for breach of contract to deliver to plaintiff, on July 1, 1895, flues manufactured by defendant for curing tobacco, it appeared that defendant wrote plaintiff on July 15th, and again on July 27th, that the flues would be sent at once,

but they were never sent: Held, that plaintiff could recover for damage to his crop, because it was not cut and cured in time, and he had to use cast-off flues in bad condition.—*NEAL v. PENDR-HYMAN HARDWARE CO.*, N. Car., 29 S. E. Rep. 96.

45. **CONTRACTS—Enforcement in Equity.**—While grub-stake contracts will be enforced by the courts, yet, in order to entitle the parties to such relief, they must prove, as in the case of other agreements, a clear and definite contract, by the terms and conditions of which, and by compliance therewith on their part, rights have become vested.—*CISNA v. MALLORY*, U. S. C. C., D. (Wash.), 85 Fed. Rep. 851.

46. **CONTRACTS—Evidence—Acceptance.**—In response to a general request for designs for a building, plaintiff and others submitted drawings, the committee reserving the right to reject any and all submitted. The committee agreed that the one receiving the greatest number of votes should superintend the construction of the building. Afterwards it was voted to reject all the drawings submitted, and then plaintiff was chosen as the architect, as having received the greatest number of first marks. At the end of 40 days, the vote appointing plaintiff was rescinded, before official notice of his appointment: Held, that the vote choosing plaintiff was not an acceptance of any offer of services submitted with his plans, since the vote rejecting his plans rejected all that he had offered, and his selection as architect was not an offer of a contract to him.—*BENTON v. SPRINGFIELD YOUNG MEN'S CHRISTIAN ASSN.*, Mass., 49 N. E. Rep. 928.

47. **CONTRACTS—Indefiniteness—Sales.**—When contracting for certain car fenders to be made and delivered, the maker asked the buyer, if, when he asked him from time to time to give him something on account to help out his pay roll, he would do it, and the buyer said he would help him: Held, that the agreement to help was too vague to be enforced.—*BLAKISTONE v. GERMAN BANK OF BALTIMORE CITY*, Md., 89 Atl. Rep. 855.

48. **CONTRACTS—Performance.**—Where, under the terms of a contract, reciprocal duties are imposed upon the respective parties, and the ability upon the part of one to perform is dependent upon performance by the other, the former will be excused from compliance, if, in consequence of the non-performance of the latter, he become unable to perform.—*DAY v. JEFFORDS*, Ga., 29 S. E. Rep. 591.

49. **CONTRACTS—Printed Forms—Repugnant Provisions.**—In a contract for a railroad fill, made out on a printed form of construction contract used generally by the railroad company, where the material is to be taken from known and prescribed distances, between named streets in a city, close to the place to be filled, and there is a written stipulation for a fixed price per square yard of earth, a further printed clause, allowing extra compensation for hauls in excess of 600 feet, may be rejected as repugnant, and as having been left in by oversight, where other written provisions seem to make it inapplicable, and the parties, during the progress of the work, have ignored it.—*BREYMAN v. ANN ARBOR R. CO.*, U. S. C. C., N. D. (Ohio), 85 Fed. Rep. 579.

50. **CONTRACTS—Validity—Consideration.**—An agreement containing rules which are to govern in the sale and shipment of cotton from one of the parties to the other is not invalid because it neither binds one party to ship nor the other to receive cotton, but is binding so far as sales and shipments are made.—*JOHNSON v. STARNGLIN*, U. S. C. C. of App., Fifth Circuit, 85 Fed. Rep. 608.

51. **CONTRACTS—Waiver—Pleading and Proof.**—In an action for breach of contract, a party who has pleaded waiver of a stipulation by subsequent contract cannot be allowed to rely on a waiver by conduct.—*STRAUS v. J. M. RUSSELL CO.*, U. S. C. C., D. (Oreg.), 85 Fed. Rep. 589.

52. **CONVERSION—Appropriation of Mortgaged Property.**—To render one liable for destroying, impairing

in value, or placing beyond the jurisdiction of this State personal property upon which there is a lien in favor of another, it must appear that the person guilty of such conduct had actual notice of the lien, and that he wrongfully and fraudulently disposed of the property for the purpose of defeating the holder of the lien.—*DE VAUGHN v. HARRIS*, Ga., 29 S. E. Rep. 613.

53. **CONVERSION—Attachment of Mortgaged Property.**—Under Pub. St. ch. 161, §75, requiring that a mortgagee of property attached by another, demanding payment of the money due, shall state in writing a true account of his debt for which the property is liable, and deliver it to the attaching creditor or officer, a mortgagee cannot maintain a suit for conversion against an attaching officer where he had demanded more than the amount due him.—*HANLEY v. DAVIS*, Mass., 49 N. E. Rep. 914.

54. **CONVERSION—Justification.**—One sued in his individual capacity for a wrongful conversion of personal property may justify by showing that the property alleged to have been wrongfully converted by him was rightfully held as the property of a lunatic, for whom, subsequent to the conversion, he had been appointed guardian; but upon the trial of such a case the plaintiff is a competent witness on her own behalf, even as to communications and transactions which occurred between herself and such lunatic before he became insane; and this is true, even though upon the trial an order was passed, without objection, making the defendant, in his representative capacity, also a party defendant, such order not being effectual to make the lunatic himself a party to the case.—*ELLIOTT v. KEITH*, Ga., 29 S. E. Rep. 155.

55. **CONVERSION—Reacquisition by Owner.**—When the owner of converted property has recovered it, the measure of his damages is the expense he has necessarily incurred, and the value of the time he has spent in recovering it, together with the value of the use of the property, if any, while he was wrongfully deprived of it, not exceeding the total value of the property at the time of the conversion.—*FIRST NAT. BANK OF KANSAS CITY, MO., v. RUSH*, U. S. C. C. of App., Eighth Circuit, 85 Fed. Rep. 589.

56. **CONVERSION—Wills.**—Where an executor invests the proceeds of an estate consisting of personal property in realty, under discretionary powers conferred in the will, the realty thus acquired is realty in law and in fact, and subject to all the incidents of such property.—*HOLMES v. PICKETT*, S. Car., 29 S. E. Rep. 82.

57. **CORONER'S INQUEST—Second Verdict.**—When an inquest has been held as the statute requires, and the verdict filed, the coroner, in the absence of a provision in the statute, has no power, upon his own motion, or at request of friends of a deceased, to hold another inquest, and no power to bind the county for the expenses of such subsequent inquest.—*BOARD OF COMRS. OF FOUNTAIN COUNTY v. VAN CLEAVE*, Ind., 49 N. E. Rep. 978.

58. **CORPORATIONS—Foreign Corporations.**—A railroad corporation, chartered in Illinois, and authorized by the legislature to lease and operate a railroad in Mississippi, which its officers and agents, upon whom service of process can be legally had, are doing, is, notwithstanding, a non-resident corporation, dwelling in Illinois.—*ILLINOIS CENT. R. CO. v. SANFORD*, Miss., 23 South. Rep. 355.

59. **CORPORATIONS—Insolvent Corporation—Appointment of Receiver.**—Where a corporation is insolvent, and is the lessee of a coal mine, and the said insolvent lessee is largely indebted to its lessor for royalty reserved in the lease, which is secured by a lien on the lease and personal property and appliances in use about the mine by the lessee, and several of the creditors of such lessee have proceeded by way of attachment, and are proceeding to seize and scatter the personal property belonging to said lessee, and to remove the rails from the tracks and wire ropes from the drums, a court of equity, on proper application made by such lessor, will appoint a receiver to take charge

of said property.—KANAWHA COAL CO. v. BALLARD & WELCH COAL CO., W. Va., 29 S. E. Rep. 514.

60. COUNTIES — Limiting Liabilities — Railroad Aid Bonds.—In determining the "existing indebtedness" of a municipality, within Const. art. 11, § 3, prohibiting municipalities from incurring indebtedness over a certain per centum on their taxable property, including existing indebtedness, the amount of cash on hand and available assets and resources readily convertible into cash should be subtracted from its outstanding indebtedness.—CROGSTER v. BAYFIELD COUNTY, Wis., 74 N. W. Rep. 635.

61. COURTS—Disqualification of Judge.—The disqualification of a judge because of interest in a case, if known to the counsel for the losing party, must be suggested before the trial proceeds, and, if not then urged, cannot afterwards be raised upon a writ of certiorari, or writ of error to review such judgment.—MEERS v. GUCKENHEIMER, Ga., 29 S. E. Rep. 486.

62. CRIMINAL EVIDENCE—Theft—Bill of Exceptions—Witness.—In a prosecution for theft of cattle stolen in pursuance of a conspiracy between W and defendant, it was error to allow evidence that, while the conspirators were on their way to get the cattle, W told the witness, out of the hearing of defendant, that the cattle belonged to defendant, who concealed them to avoid judgment creditors, since such statement was not made in pursuance of the conspiracy.—DUNGAN v. STATE, Tex., 45 S. W. Rep. 19.

63. CRIMINAL EVIDENCE—Dying Declaration.—In a prosecution for murder, a dying declaration, made voluntarily by deceased, who at the time had no hope of life, as to how the difficulty which resulted in his death commenced, which was continued by other witnesses on the trial where deceased left off, showing the culmination of the affair, is admissible.—BRANDE v. STATE, Tex., 45 S. W. Rep. 17.

64. CRIMINAL LAW—Arraignment—Necessity.—When it is discovered during the trial on the charge of a felony that there has been no arraignment and plea, the court should not proceed with the trial without arraignment of the accused, entering his plea, and causing the jury to be resworn, and the witnesses to be re-examined.—BROWNING v. STATE, Neb., 74 N. W. Rep. 681.

65. CRIMINAL LAW—Assault with Deadly Weapon.—As matter of law, a battery committed with a rock or other heavy instrument, whereby the skull of the person assaulted is fractured and his life endangered, cannot be justified because of the use by the latter of opprobrious words or abusive language to the person inflicting the battery.—SAMUELS v. STATE, Ga., 29 S. E. Rep. 427.

66. CRIMINAL LAW—Compounding Misdemeanor.—The compounding of a public misdemeanor is an indictable offense at common law.—STATE v. CARVER, N. H., 39 Atl. Rep. 978.

67. CRIMINAL LAW—Disturbing Public Worship.—Disturbing even a single member of a congregation of persons lawfully assembled for divine services by doing any of the acts forbidden by section 418 of the Penal Code is such a violation of the provisions of that section as to render the offender indictable.—NICHOLS v. STATE, Ga., 29 S. E. Rep. 431.

68. CRIMINAL LAW—Embezzlement by State Officer.—Defendant, who was indicted for embezzlement, was treasurer of the University of Illinois, an institution founded by State laws, maintained by State and federal funds, and governed by trustees elected by the people. The jury was instructed that the defendant was an officer of a "municipal" corporation, and subject to Cr. Code, § 80, providing for the punishment of embezzlement by any State, county, township, city, town, village, "or other officer" elected or appointed under the constitution or laws of the State: Held, that the university was a public corporation, in common with those mentioned in section 80, and the words "or other officer" mean any like officer, and the defendant was an officer of the same kind as those mentioned in the section, so as to make it immaterial

whether the court called it a municipal or a public corporation.—SPALDING v. PROPER, Ill., 49 N. E. Rep. 998.

69. CRIMINAL LAW—Extortion.—Where a constable, by color of his office, took from another costs alleged to be due to a magistrate and to himself upon a peace warrant, before the bond required thereon had been returned to the superior court, such constable was guilty of the offense of extortion, as defined in section 298 of the Penal Code.—LEVAR v. STATE, Ga., 29 S. E. Rep. 467.

70. CRIMINAL LAW—Homicide—Evidence.—Where defendant had testified that he had won certain money, which he attempted to take from deceased by violence, and there was circumstantial evidence tending to show that he did not win it, and had no claim to it, a charge that, if defendant killed deceased in the perpetration of robbery, it would be murder in the first degree, did not impinge on defendant's right under the charge of murder in the second degree, manslaughter and self-defense.—GREER v. STATE, Tex., 45 S. W. Rep. 11.

71. CRIMINAL LAW—Homicide—Plea of Former Acquittal.—Pleas of former acquittal and former conviction are treated with liberality as to their structure, not requiring the certainty of pleas in abatement, or even of indictments. They must, however, state sufficient facts to show the party entitled to those defenses.—STATE v. CROSS, W. Va., 29 S. E. Rep. 527.

72. CRIMINAL LAW—Homicide—Wrecking Railroad Train.—Where a person is indicted for the offense of wrecking a railroad train, and it is alleged in the indictment that the wrecking of such railroad train resulted in the death of a human being, inasmuch as the law denominates such a homicide murder, it is not error for the trial judge to give in charge to the jury the law defining the offense of murder as it is expressed in section 60 of the Penal Code.—SHAW v. STATE, Ga., 29 S. E. Rep. 477.

73. CRIMINAL LAW—Indictment—Return by Grand Jury.—The grand jury may prefer charges founded upon the knowledge of members of the body.—STATE v. RICHARD, La., 28 South. Rep. 381.

74. CRIMINAL LAW—Indictments in Misdemeanor Cases.—The constitution of this State does not guarantee the right to demand indictment by the grand jury in misdemeanor cases; and it therefore follows that an act providing that the accused in cases falling within the jurisdiction of a designated city court shall not have the right to demand indictment is valid and constitutional.—GORDON v. STATE, Ga., 29 S. E. Rep. 444.

75. CRIMINAL LAW—Principal in Second Degree.—Mansf. Dig. § 1505, defining an accessory as one "who stands by, aids, abets or assists" in the perpetration of a crime, one who is thus indicted as an accessory is charged as a principal in the second degree under the common law, and proof that his principal in the first degree was convicted is irrelevant and immaterial.—WILLIAMS v. UNITED STATES, I. T., 45 S. W. Rep. 117.

76. CRIMINAL LAW—Rape.—Rape, according to our Code, being the carnal knowledge of a female forcibly and against her will, if the sexual act be accomplished with the mental consent and acquiescence of the female, and not in opposition to her will, the offense of rape is not committed; and, even though such consent be induced by the use of such a measure of force as might, under ordinary circumstances, serve to overcome her power of resistance, if, notwithstanding the use of such force, she finally consent to the sexual act, and her will cease to operate against its consummation, the offense is not rape.—MATHEWS v. STATE, Ga., 29 S. E. Rep. 424.

77. CRIMINAL LAW—Reception of Evidence.—It is always, in a criminal trial, within the discretion of the trial judge, after the accused has made his statement, to admit additional relevant evidence in behalf of the State, even though the same may not be in rebuttal of

anything contained in such statement. — *COOPER V. STATE, Ga.*, 29 S. E. Rep. 439.

78. **CRIMINAL LAW—Seduction—Accomplice—Corroboration.**—Defendant, at the time the seduction was alleged to have taken place, paid prosecutrix assiduous attention. A witness testified that defendant admitted his engagement to marry prosecutrix, and of his having intercourse with her, and saw them in the act: Held, sufficient corroboration of prosecutrix, who testified that the intercourse was superinduced by promise of marriage, to sustain a conviction of seduction. — *ANDERSON V. STATE, Tex.*, 45 S. W. Rep. 15.

79. **CRIMINAL LAW—Slander—Innuendo.**—In an indictment for slander, the accused was charged with having told B that he had seen the prosecutrix and one L "getting there." Held, that the expression "getting there" did not impute a want of chastity to the prosecutrix, but was susceptible of that meaning by innuendo. — *WHITEHEAD V. STATE, Tex.*, 45 S. W. Rep. 10.

80. **CRIMINAL LAW—Trial of Accessory—Confessions of Principal.**—Where two persons are in one count of an indictment charged as joint principals, and one of them, in another count, is also charged as accessory before the fact, it is not erroneous on the trial of the latter, upon the indictment as a whole, to admit in evidence confessions made by the other accused person, after the enterprise had ended, to establish his guilt as principal, such confessions being limited to this purpose by the action of the presiding judge. Such evidence, relatively to the second count mentioned, is admissible as tending to establish the necessary element to the guilt of the person charged as accessory, to-wit, the guilt of his alleged principal. — *BROOKS V. STATE, Ga.*, 29 S. E. Rep. 485.

81. **DECEIT—False Representations—Damages.**—In an action to recover damages for false representations as to the value of corporate bonds and the amount and value of the property on which they are secured, by which the plaintiff has been induced to purchase such bonds, the fact that interest has been regularly paid on such bonds for several years does not conclusively show that the plaintiff has suffered no damage. — *CURRIER V. POOR, N. Y.*, 42 N. E. Rep. 987.

82. **DEDICATION—Object of Donation.**—The donors of land to a city, to be used as a public park, may sue to restrain the city from diverting it to any other use not consistent therewith. — *ROWZEE V. PIERCE, Miss.*, 23 South. Rep. 307.

83. **DEED—Cancellation—Failure of Consideration.**—In an action to cancel a deed made in consideration of an agreement to deliver a certain number of trees, where the recitals of the deed, the order given by the grantee on another for the delivery of said trees, and the evidence conduce to show that plaintiff was to have trees of a certain kind, that no such trees could be obtained on the order, and that defendant had not complied with the agreement, the deed should be canceled. — *WESTERFIELD V. PENDLETON, Ky.*, 45 S. W. Rep. 97.

84. **DEED—Restrictions.**—A condition in a deed providing that the property conveyed "shall be used for residence purposes only" does not forbid the erection of an apartment building, to contain flats, each complete for housekeeping, but to be provided with a large dining room for the use of occupants who may desire to use it instead of their own private dining rooms. — *MCMURTRY V. PHILLIPS INV. CO., Ky.*, 45 S. W. Rep. 96.

85. **DESCENT AND DISTRIBUTION—Half Blood.**—Real estate which one has inherited from his father does not, on his death, descend to his half-brother by another father; Act April 8, 1833, § 6, which provides that real estate of intestate dying without issue, brothers or sisters of full blood, or father or mother, shall, subject to any life estate given by the act, descend to brothers and sisters of the half blood of intestate, being subject to section 9, declaring that no per-

son not of the blood of the relative from whom real estate descended to intestate shall "in any of the cases before mentioned" inherit the same, but it, subject to any life estates given by the act, shall pass to such persons as would be entitled had the persons not of the blood of the ancestor never existed. — *HENSLEY V. GROSS, Penn.*, 39 Atl. Rep. 949.

86. **DIVORCE—Jurisdiction—Contract for Separation.**—Plaintiff, a resident of New York, was married there to defendant, a resident of Kentucky, and went to reside at defendant's home. About three years later they separated, and plaintiff returned to New York, with the intention of changing her residence to that State. Thereafter defendant commenced an action for divorce against plaintiff in Kentucky, in which she was served by constructive process, and did not appear, and in which a decree of divorce was granted. Plaintiff afterwards commenced an action in New York against defendant for limited divorce on the ground of cruelty: Held that, as it was found as a fact that plaintiff was justified in leaving defendant, her matrimonial domicile in Kentucky did not continue after her separation from her husband, and accordingly the Kentucky court had not obtained jurisdiction of her, and its decree was not a bar to her suit in New York for limited divorce. — *ATHERTON V. ATHERTON, N. Y.*, 49 N. E. Rep. 933.

87. **DIVORCE—Separation—Cruelty.**—The proof disclosing that a voluntary separation of the spouses was principally induced by the open, public, and notorious association by the husband with a married woman under suspicious circumstances, continuing through a series of seven years, and culminating in an open conflict between them on a much frequented thoroughfare of a populous city, a case is presented by the wife entitling her to a separation from bed and board and of property from her husband. Such a course of conduct is the very refinement of cruelty and ill treatment on the part of the husband. — *HOLMES V. HOLMES, La.*, 23 South. Rep. 324.

88. **EMINENT DOMAIN—Measure of Damages.**—If a part of a public school house lot is taken by a railroad company, the measure of damages is the value of the land taken, together with the damages to the residue, less peculiar benefits thereto from the construction of the railroad. — *BOARD OF EDUCATION V. KANAWHA & M. R. CO., W. Va.*, 29 S. E. Rep. 503.

89. **EQUITY—Multiplicity of Suits—Community of Interests.**—A number of persons having distinct interests in a quantity of tea about to be destroyed by a collector of customs, under the act forbidding importation of impure teas, may, on the ground of preventing a multiplicity of suits, maintain a suit in equity to enjoin the collector, since they have a common interest in the question whether he has legal authority to commit the act. — *SANG LUNG V. JACKSON, U. S. C. C., N. D. (Cal.)*, 85 Fed. Rep. 502.

90. **EQUITY—State Statute—Service by Publication.**—A State has authority by statute to so enlarge the equity powers of its courts as to confer upon them jurisdiction to adjudicate the titles and liens upon real estate within its borders as against non-residents who are brought into court by publication only. — *ORMSBY V. OTTMAN, U. S. C. C. of App.*, Eighth Circuit, 85 Fed. Rep. 492.

91. **EVIDENCE—Negligence—Res Gestæ.**—A declaration or admission, to be competent evidence as *res gestæ*, must be made at such time, and under such circumstances, as to raise the presumption that it is the unpremeditated and spontaneous explanation of the matter about which made. — *UNION PAC. RY. CO. V. ELIOTT, Neb.*, 74 N. W. Rep. 627.

92. **EVIDENCE—Opinions.**—In an action for personal injuries, wherein the issue was contributory negligence, plaintiff's testimony as to whether he was careful was incompetent, as being a mere opinion. — *PHIBBS V. CAROLINA CENT. R. CO., N. Car.*, 29 S. E. Rep. 578.

93. **EVIDENCE—Parol Evidence—Trust.**—Evidence that the grantee in a deed in fee simple took the title conveyed to him subject to a parol trust, declared by

the grantor at the time it was made, does not contradict the deed, and is competent.—*HUGHES V. PRITCHARD*, N. Car., 29 S. E. Rep. 93.

94. **EXECUTION—Limitation—Levy by Coroner.**—Where an entry made by a coroner upon an execution which is not directed to him is relied upon to save from dormancy the judgment from which such execution was issued, it must appear that before the entry was made an affidavit had been made in accordance with section 496 of the Political Code.—*BALDWIN V. HUDSON*, Ga., 29 S. E. Rep. 601.

95. **EXECUTION—Exemptions—Claims.**—A head of a family who, as such, files a claim to property levied upon under an execution issued against him as an individual, has the right to withdraw such claim, and, upon his so doing, the same presents no further obstacle to the progress of the execution. It does not, however, follow that the mere withdrawal of the claim renders the exempted property subject to the execution.—*KENNEDY V. JAHAN*, Ga., 29 S. E. Rep. 188.

96. **EXECUTION—Supplementary Proceedings—Receiver.**—The appointment of a receiver for an indebtedness due to a judgment debtor was not erroneous, on the ground that the debt had been extinguished, when the order appointing the receiver did not determine the amount due upon the claim or prevent the cancellation of the debt from being shown as a defense to an action to recover thereon.—*GLOBE PHOSPHATE CO. V. PINSON*, S. Car., 29 S. E. Rep. 549.

97. **FEDERAL OFFENSE—Counterfeiting—Similitude of Obligation.**—The "similitude" contemplated in Rev. St. § 5430, which makes criminal the having in one's possession, with intent to sell or use the same, "any obligation or security engraved and printed after the similitude of any obligation or other security issued under the authority of the United States," is such a likeness or resemblance as to be calculated to deceive an honest, sensible, and unsuspecting man of ordinary care and observation, when dealing with a supposed honest man.—*UNITED STATES V. KUHLE*, U. S. D. C., S. D. (Iowa), 85 Fed. Rep. 624.

98. **FEDERAL COURTS—Jurisdictional Amount—Pleading.**—In a suit to foreclose a mortgage securing the sum of \$2,000, the bill alleged that plaintiff advanced an additional \$2.25 to pay the fee for recording the mortgage, "for which defendant is liable to him." Held, that the averment of liability was a mere conclusion of law, and that the bill therefore failed to show that more than \$2,000 was involved.—*LESS V. ENGLISH*, U. S. C. C. of App., Eighth Circuit, 85 Fed. Rep. 471.

99. **FRAUDULENT CONVEYANCE—Action to Set Aside.**—Rev. St. 1889, § 571, providing that any attaching creditor may sue to set aside any fraudulent conveyance of any property attached, authorizes an attaching creditor to proceed without more, and removes the case from the general rule that one seeking aid in equity must first exhaust his remedies at law.—*MANSUR & TERRETT'S IMPL. CO. V. JONES*, Mo., 45 S. W. Rep. 41.

100. **FRAUDULENT CONVEYANCES—Execution Sales.**—Property given by way of advancement by a father to his son, being in fraud of creditors, may be sold on execution against the father, as though he had made no conveyance.—*HOWARD V. DUKE*, Ky., 45 S. W. Rep. 69.

101. **GARNISHMENT—Conclusiveness of Judgment.**—Where a creditor attached moneys due his debtor, an order sustaining the attachment, directing payment by the garnishees to the creditor, and discharging them from liability, is a final determination of the rights of one who voluntarily intervened, claiming the moneys attached, and failed to appeal from such order.—*THOMAS V. CLARK COUNTY NAT. BANK*, Ky., 45 S. W. Rep. 73.

102. **GARNISHMENT—Plaintiff Garnishing Himself.**—Neither the provision of the Tennessee statutes for garnishment of debts, etc., in the hands of "third parties" (Mill. & V. Code, § 4219), nor that authorizing attachments upon any real or personal property, "debts,

or choses in action in which defendant has an interest" (section 4241), authorizes a plaintiff to garnish himself for a debt due the defendant.—*RICE V. SHARPLEIGH HARDWARE CO.*, U. S. C. C., W. D. (Tenn.), 85 Fed. Rep. 559.

103. **GARNISHMENT—Property Subject.**—A garnishment served upon an employer is not effectual to reach the salary of an employee if the former was not indebted to the latter at the time the garnishment was served, and did not become indebted to him previous to the time of making answer; and this is true although the employer, even after service, paid the employee his salary in advance, for the purpose of preventing the same from being reached by the garnishment.—*HALL V. ARMOUR PACK CO.*, Ga., 29 S. E. Rep. 139.

104. **GIFT OF LAND—Declaration of Husband.**—Where a wife sued to establish a parol gift of land, her husband's declarations made in her absence, after her rights had fully accrued, are not admissible against her, though he resided on the land with her, and assisted in making the improvements necessary to consummate the title.—*LA MASTER V. DICKSON*, Tex., 45 S. W. Rep. 1.

105. **HOMESTEAD—Allotment—Presumptions.**—As against a creditor who was duly served with notice of an application for a homestead, filed and approved in 1885, it will, though the homestead proceeding does not so disclose, be presumed that a proper order to the surveyor to lay off and plat the homestead was granted; nor, as to such creditor, will a homestead so approved be treated as invalid because the plats of two lots composing the same "did not purport to be made by the county surveyor, and were not sworn to, accompanied by an affidavit as the law requires."—*DUNAGAN V. STADLER*, Ga., 29 S. E. Rep. 440.

106. **HUSBAND AND WIFE—Conveyance by Wife.**—A wife cannot convey land directly to her husband.—*VICROY V. VICROY*, Ky., 45 S. W. Rep. 76.

107. **HUSBAND AND WIFE—Separate Estate.**—If a valid sale or gift of personal property be made by a husband to his wife, although not expressed to be for her separate use, it will be so treated.—*KELLEY V. GRUNDY*, Ky., 45 S. W. Rep. 100.

108. **INJUNCTIONS—Action on Bond.**—The defendant, in a suit for an injunction to restrain the sale of certain personality under an execution, was not entitled, in an action on the bond, to recover his costs and attorney's fees incurred in obtaining the dissolution of such injunction, in the absence of evidence that he had sustained any injury by reason of the service thereof, and where it appeared that he had abandoned his rights under the levy, in consequence of the seizure of the property by the county treasurer, by virtue of a distraint warrant for unpaid taxes.—*GROVE V. WALLACE*, Colo., 82 Pac. Rep. 639.

109. **INJUNCTIONS—Land Dedicated to Public Park.**—Where land had been dedicated by the promoters of a town site for a public park, and the town, after its incorporation, by an ordinance, directed the same to be sold, a taxable inhabitant of such town who is injured in his individual rights, either as to his person or property, may enjoin a purchaser of land in said park from building thereon.—*DAVENPORT V. BUFFINGTON*, I. T., 45 S. W. Rep. 128.

110. **INJUNCTIONS—Proceedings for Contempt.**—Whether the defendant railroad company had the right to maintain gates at a certain crossing on its location, and whether it was obliged to provide some one to attend them, could not be determined in proceedings for contempt for failure to comply with certain terms of the decree in the original cause, restraining defendants from interfering with the use of such crossing, in which decree such questions were expressly left open, as such jurisdiction is in its nature penal, and the sole question for consideration, in such proceedings, is whether defendants have complied with the terms of the decree in question.—*HAMLIN V. NEW YORK, N. H. & H. R. CO.*, Mass., 49 N. E. Rep. 922.

111. **INSURANCE—Condition as to Vacancy.**—When a dwelling is left merely in the care of a person living within the same inclosure, it is vacant, within the clause of an insurance policy providing that the policy should be void if the building should become vacant, and so remain for 10 days.—*BURNER'S ADMR. v. GERMAN-AMERICAN INS. CO., Ky.*, 45 S. W. Rep. 109.

112. **INSURANCE—Contract—Authority of Agent.**—R F agreed with one C, who solicited insurance for the A Ins. Co., that certain property then belonging to her husband should be insured in a specified sum, and for a stipulated premium and time, and that she would pay a balance of premium within a short time. Within that time she went to the office of an agent of the insurance company, and there saw C, who, taking the balance of premium offered, said that they were not ready for her, but would send "the paper" through the mail. Subsequently a policy of insurance written upon the blank policy in use by the insuring company, made in her name as the insured, came by post to R F, who accepted and retained it with her valuables until after the property insured was destroyed by fire: Held, that the contract made with the company was that which was stated in the policy, and was not a parol contract for insurance, with the husband of R F.—*AGRICULTURAL INS. CO. OF WATERTOWN, N. Y., v. FRITZ, N. J.*, 39 Atl. Rep. 910.

113. **INSURANCE—Insurable Interest.**—The owner conveyed land to his wife on the agreement that he should be allowed the possession and use thereof free of charge, and that she would reconvey on his request, he agreeing to pay taxes and insurance, and to make necessary repairs and improvements: Held, that he retained an insurable interest.—*JACOBS v. MUTUAL INS. CO. OF GREENVILLE, S. Car.*, 29 S. E. Rep. 533.

114. **INTEREST—When Allowed—Damages.**—As matter of law, unliquidated demands, arising *ex delicto*, do not bear interest, and on a suit to recover the value of property which has been injured or destroyed the jury cannot legally find a given amount for principal, with an additional amount as interest.—*WESTERN & A. R. CO. v. BROWN, Ga.*, 29 S. E. Rep. 180.

115. **INTOXICATING LIQUORS—Local Option.**—Where the local option law was in force in a precinct, the legislature could not impose by an amendatory act new burdens or obligations upon the people of that precinct pending the operation of such local option law.—*EX PARTE BAINS, Tex.*, 45 S. W. Rep. 24.

116. **INTOXICATING LIQUORS—Sale by Officer.**—A right of property in spirituous and malt liquors exists under the law in all the counties of this State, and this property is subject to a judgment against the owner in like manner and to the same extent as other property.—*FEARS v. STATE, Ga.*, 29 S. E. Rep. 463.

117. **JUDGMENT—Equitable Relief.**—A court of equity will not grant relief against a judgment obtained at law when the petition for such relief is founded solely upon causes which might, by the exercise of ordinary diligence, have easily been ascertained and set up as a defense to the action in which such judgment was rendered.—*REDWINE v. MCAFEE, Ga.*, 29 S. E. Rep. 428.

118. **JUDGMENT—Equitable Relief.**—When a defendant, by bill in equity, seeks to nullify a judgment at law obtained against him without service of process, upon unauthorized appearance by attorney, to succeed he must have a clear preponderance of evidence sustaining the allegations of his bill.—*SMITH v. JOHNSON, W. Va.*, 29 S. E. Rep. 509.

119. **JUDGMENT—Joint Obligors—Judgment Against One—Effect.**—The common law rule that a judgment recovered against one of two joint debtors is a bar to an action against the other was not changed by Burns' Rev. St. 1894, § 322 (Rev. St. 1891, § 320), providing that when the action is against two or more defendants, and the summons is served on one or more, plaintiff may, if the action be against defendants jointly indebted on contract, proceed against the defendant served, and, if he recover judgment, enforce it against

the joint property of all and the separate property of defendant served; and, if it be against defendants severally liable, he may proceed against defendants served as if they were the only defendants, and afterwards against the one not served; and, if all the defendants have been served, judgment may be taken against any or either of them severally.—*CAPITAL CITY DAIRY CO. v. PLUMMER, Ind.*, 49 N. E. Rep. 963.

120. **JUDGMENT—Vacating—Surprise.**—A judgment may be vacated for excusable neglect or surprise, though the party against whom the judgment was rendered was represented by counsel.—*EX PARTE ROUNTREE, S. Car.*, 29 S. E. Rep. 66.

121. **JUDGMENT AGAINST CORPORATION—Conclusive-ness as to Stockholders.**—A judgment against a corporation is conclusive upon the stockholders, so that they cannot maintain a suit in equity to set it aside, after the corporation has made every defense against the judgment.—*HENDRICKSON v. BRADLEY, U. S. C. C. of App.*, Eighth Circuit, 85 Fed. Rep. 508.

122. **JUDGMENT AGAINST MINOR—Collateral Attack.**—Minors are certainly so far concluded by a judgment regular on its face, and rendered by a court of competent jurisdiction, in an action brought in their name by a next friend, as that they cannot collaterally attack its validity when produced in evidence against them in another and entirely distinct proceeding. If the action was brought without proper authority, or if the judgment was for any reason unlawful or improper, it should have been directly attacked in the court by which it was rendered.—*LOWE v. EQUITABLE MORTG. CO., Ga.*, 29 S. E. Rep. 148.

123. **JUDGMENT BY DEFAULT—Trove and Conversion.**—Under Code Civ. Proc. § 386, which provides that in all actions except those on express or implied contract to pay a liquidated sum, when defendant fails to answer, judgment by default and inquiry may be had on proof of service of summons, in an action for converting cotton and embezzling the proceeds, where defendant failed to answer, a judgment by default might be rendered against him, which would be final as to the conversion and embezzlement.—*MCLEOD v. NIMOCKS, N. Car.*, 29 S. E. Rep. 577.

124. **JUDICIAL SALES—Defect in Quantity—Rights of Purchaser.**—A purchaser at a judicial sale of land of a deceased person, receiving by mistake a less number of acres than was intended to be conveyed, although the commissioner's deed contains no warranty, is entitled to a *pro rata* reduction in the prices.—*COOPER v. HARGIS' ADMR., Ky.*, 45 S. W. Rep. 112.

125. **LANDLORD AND TENANT—Distress Warrant.**—Though a landlord possesses a lien for rent on the whole of the tenant's property on the premises under a distress warrant for rent, he cannot without liability attach more than is sufficient to pay the rent due and costs, the command of the distress warrant (Rev. St. 1895, art. 3242) being to seize the property of the defendant, or so much thereof as will satisfy the demand.—*McKEE v. SIMS, Tex.*, 45 S. W. Rep. 37.

126. **LANDLORD AND TENANT—Forfeiture of Lease.**—Under a lease of a building to be used "for mercantile purposes and dwelling," and not otherwise, and providing for forfeiture in case of violation, the lessee forfeited his right by subletting such premises for a barber shop.—*CLEVE v. MAZZONI, Ky.*, 45 S. W. Rep. 88.

127. **LANDLORD AND TENANT—Implied Covenants.**—The letting of a furnished house for a term of years raises no implied covenant that it is suitable for the purposes of the lessee's occupation.—*DAVIS v. GEORGE, N. H.*, 39 Atl. Rep. 979.

128. **LIFE INSURANCE—False Statements—Waiver by Notice.**—Where, in effecting a contract of insurance, the assured and the agent of the insurer are dealing at arm's length, the latter is charged, on behalf of his principal, with notice of any facts material to the risk of which he may have knowledge, which were not communicated to him with respect of some matter springing out of a confidential relation, and which, at that time, were present to his mind, whether such

facts came to his knowledge before or after he became the agent of the insurer.—*GERMAN-AMERICAN MUT. LIFE ASSN. V. FARLEY, Ga.*, 29 S. E. Rep. 615.

129. LICENSE.—A right given to a railroad company to enter on the premises of another, to take up or alter its rails, includes, incidentally, the right of egress from said premises.—*WILLOUGHBY V. NORTH EASTERN R. CO., S. Car.*, 29 S. E. Rep. 629.

130. LOGS AND LOGGING—Contract—Evidence.—A logger wrote offering to sell logs to a sawyer on the giving of negotiable paper by the sawyer, who indorsed his acceptance on the letter. Next day the logger acknowledged receipt of the paper, and offered to buy back the logs at the same price, to pay for sawing, and to take up the paper by a certain time from the sale of lumber, which offer was accepted: Held, that the sawyer received the logs as security for advances made, and did not buy and thereafter sell them.—*GERMAIN V. CENTRAL LUMBER CO., Mich.*, 74 N. W. Rep. 644.

131. MALICIOUS PROSECUTION—Malice.—It is a question for the jury, in an action for malicious prosecution, whether malice may be inferred from a want of probable cause.—*MCGOWAN V. MCGOWAN, N. Car.*, 29 S. E. Rep. 97.

132. MALICIOUS PROSECUTION—Probable Cause.—A right of action for a malicious prosecution exists only when the prosecution is the result of a desire to injure the accused. In such an action malice against the accused may be inferred from want of probable cause, but the want of probable cause will not be inferred, even though malice is shown to have existed.—*HICKS V. BRANTLEY, Ga.*, 29 S. E. Rep. 459.

133. MANDAMUS TO BANK.—*Mandamus* will not lie for the purpose of compelling a bank to pay, out of the funds of a succession deposited with it, a check drawn by two executors, when there is a third executor protesting against the payment.—*ALLEN V. LOUISIANA NAT. BANK, La.*, 23 South. Rep. 360.

134. MARRIAGE—Evidence.—Evidence that prior to alleged common-law marriage the woman had illicit intercourse with others is not admissible to disprove the marriage.—*IN RE COMLY'S ESTATE, Penn.*, 39 Atl. Rep. 890.

135. MARRIAGE—Validity.—The next of kin of a deceased woman, claiming to be her heirs at law upon the theory that she died unmarried, may, whenever in a legal proceeding it becomes essential to the assertion of their rights, attack as void an alleged marriage between the deceased and another, on the ground that at the time the marriage ceremony was performed she was of unsound mind, and mentally incapable of contracting marriage.—*MEDLOCK V. MERRITT, Ga.*, 29 S. E. Rep. 185.

136. MARRIED WOMEN—Contracts—Negotiable Notes.—Under the well-established rule that a married woman who signs negotiable promissory notes apparently as a joint principal, though, in fact, she is a surety only, becomes liable to a *bona fide* purchaser for value who buys the notes before their maturity, and without notice of the suretyship, the verdict in the plaintiff's favor was, under the evidence submitted, fully warranted.—*VENABLE V. LIPPOLD, Ga.*, 29 S. E. Rep. 181.

137. MASTER AND SERVANT—Fellow-Servants.—An engineer who acts also as conductor of the train and a section master are fellow-servants.—*WRIGHT V. NORTHAMPTON & H. R. CO., N. Car.*, 29 S. E. Rep. 100.

138. MASTER AND SERVANT—Furnishing Safe Tools—Fellow-Servants.—When a servant has informed his foreman and superintendent that his tools are unsafe, it is their duty to furnish reasonably safe tools, and in so doing they are not his fellow-servants, but the master's representatives.—*LEHIGH VALLEY COAL CO. V. WARREK, U. S. C. C. of App.*, Second Circuit, 85 Fed. Rep. 866.

139. MASTER AND SERVANT—Negligence.—Where a foreman of a mine, as the agent of the company, se-

lects an employee to take the place temporarily of another employee who is excused from work, and the person so selected is subject to the direction and control of the company, which may discharge him at any time, the relationship between him and the company is that of master and servant.—*WILSON V. SIOUX CONSOL. MIN. CO., Utah*, 52 Pac. Rep. 626.

140. MASTER AND SERVANT—Negligence—Assumption of Risk.—An invitation from the master or proprietor to come upon dangerous premises, without apprising him of the danger, is just as culpable, and an injury resulting from it is just as deserving of compensation in the case of a servant, as in any other.—*STUCKE V. ORLEANS R. CO., La.*, 23 South. Rep. 342.

141. MASTER AND SERVANT—Risks of Employment.—A risk which the master has created by doing or permitting something to be done which ought not to have been done, or by omitting some precaution which, in the exercise of ordinary care, ought to have been taken, cannot be regarded as one of the ordinary risks of any employment.—*GEORGE V. CLARK, U. S. C. C. of App.*, Eighth Circuit, 85 Fed. Rep. 608.

142. MASTER AND SERVANT—Negligence—Vice-Principal—Fellow-Servants.—One who is employed in the capacity of engineer for an incorporated manufacturing company, but who is likewise under a duty to obey generally the orders of a person who is placed in authority over him, and who has power temporarily to withdraw him from the performance of the special duty for which he was employed, and to assign him to the performance of other and inconsistent duties, not connected with or embraced within his special employment, is not a fellow-servant with such superior; and if, while engaged in the performance of such duties which had been so assigned to him by his superior, he be injured, he cannot be regarded as a mere volunteer.—*BLACKMAN V. THOMPSON-HOUSTON ELECTRIC CO. OF AUGUSTA, Ga.*, 29 S. E. Rep. 120.

143. MINING CLAIM—Forfeiture—Assessment Work.—A judgment quieting title to mining lands in favor of one of the original locators and his co-claimants, as against defendant, whose relocation was invalid, because the claim was not subject to forfeiture, cannot be attacked by defendant on the ground that the co-claimants' alleged title was in other parties; since that is a question to be decided among plaintiffs, which in no way affected defendant's right to the property.—*NESBITT V. DE LAMAR'S NEVADA GOLD-MIN. CO., Nev.*, 52 Pac. Rep. 609.

144. MORTGAGE—Condition as to Taxes.—Where, at the time a deed is made "subject to an incumbrance of \$3,000, interest and taxes for the year 1896, which interest and taxes the grantee agrees to pay," the grantee gives the grantor a mortgage, stating that the premises are conveyed subject to an incumbrance of \$3,000, but omitting reference, in this connection, to interest and taxes, and containing covenant that the premises are free from all incumbrance except as aforesaid, the condition that the mortgagor shall pay "all taxes and assessments, to whomsoever laid or assessed," applies to a tax already assessed as well as one to be assessed.—*STEVENS V. COHEN, Mass.*, 49 N. E. Rep. 926.

145. MORTGAGES—Foreclosure—Issues.—When a defendant in an action to foreclose a mortgage raises the question of paramount title in himself, which would defeat the plaintiff's recovery as to him, he is entitled to have the issue of title tried by a jury.—*LOAN & EXCHANGE BANK OF SOUTH CAROLINA V. PETERKIN, S. Car.*, 29 S. E. Rep. 546.

146. MORTGAGES—Foreclosure Sale—Redemption.—A subsequent incumbrancer, who was a party to the foreclosure suit on a prior mortgage, after foreclosure sale, and a purchase by the prior mortgagee, cannot redeem from the prior mortgagee without settling the sale aside as to all parties thereto.—*WIMPFHEIMER V. PRUDENTIAL INS. CO. OF AMERICA, N. J.*, 39 Atl. Rep. 916.

147. MORTGAGES—Parties—Estate Conveyed.—If an instrument purports to convey the entire estate of the

wife, a party thereto, it operates as a waiver of her homestead exemption in the land conveyed.—*HAYS v. FROMAN*, Ky., 45 S. W. Rep. 87.

148. MORTGAGE—Foreclosure Sales—Vacation.—A mortgagee who had negligently failed to attend the foreclosure sale is not entitled to have it set aside to enable him to advance the purchaser's bid, where the sale was regular, and the land brought its market value.—*COLONIAL & U. S. MORTG. CO. v. SWEET*, Ark., 45 S. W. Rep. 69.

149. MUNICIPAL CORPORATIONS—Annexation of Territory.—*BURNS' Rev. St. 1894, § 3659 (Rev. St. 1881, § 3196)*, provides that when territory is to be annexed to a city it shall present a petition to the county commissioners correctly describing the land by metes and bounds, and shall publish a notice of the intended petition, describing the territory sought to be annexed: Held, that the annexation of territory was not invalidated because the petition and notice erroneously stated the names of the owners of land, when it was correctly described by metes and bounds in both the petition and notice.—*POWELL v. CITY OF GREENBURG*, Ind., 49 N. E. Rep. 955.

150. MUNICIPAL CORPORATIONS—Authority to Sell Liquor—Injunction.—Neither the "general welfare clause," usually found in the charters of towns and cities, nor the special power "to license and regulate the management of barrooms, saloons," etc., includes the power to run and operate barrooms and saloons, or to otherwise embark the municipal corporation having authority to exercise such powers only, either in the business of selling liquor or in any other commercial enterprise. The exercise of such a power, being inconsistent with the purposes for which municipal corporations are ordinarily organized, must rest upon express legislative authority, and, in the absence of such authority, such a power does not exist.—*MAYOR, ETC., OF TOWNS OF LEBESBURG v. PUTNAM*, Ga., 29 S. E. Rep. 602.

151. MUNICIPAL CORPORATIONS—Construction of Streets—Damages.—The right to recover the amount of damages appraised by the street commissioners and adopted by the common council, on account of the construction of a street through plaintiff's premises by a city in accordance with the provisions of its charter, was not suspended during the pendency of an appeal by other owners, not including plaintiff, from the estimate of their respective damages and benefits.—*ROPER v. CITY OF NEW BRITAIN*, Conn., 39 Atl. Rep. 850.

152. MUNICIPAL CORPORATIONS—Highway Taxes—Objection to Tax.—Where a city and town covering the same territory are consolidated so that under 3 Starr & C. Ann. St. (2d Ed.) p. 3948, "the powers vested in such town shall be exercised by the city council," the council has no power to levy taxes for roads and bridges, since town highway commissioners cannot levy taxes for the construction or maintenance of city streets.—*PEOPLE v. CHICAGO & A. R. CO.*, Ill., 49 N. E. Rep. 952.

153. MUNICIPAL CORPORATIONS—Surface Water—Damages.—Where a city lot is or becomes a public nuisance, not because of anything done by the municipal authorities, but in consequence of overflows of surface water resulting from rains, and the city, for the sole purpose of abating this nuisance and preventing its recurrence, either itself lays, or requires or permits the lot owner under its supervision to lay a drain pipe in and across an adjacent street; and thereafter, in constructing a sewer constituting a part of a system of public sewerage essential to the health and welfare of the city, destroys this drain pipe, so that water again accumulates upon the lot as it had previously done, a tenant of such owner cannot maintain against the city an action for damages thus occasioned to a business he is conducting upon such lot, or to his property thereon.—*IVEY v. MAYOR, ETC. OF MACON*, Ga., 29 S. E. Rep. 151.

154. MUNICIPAL IMPROVEMENTS—Assessments—Relief in Equity.—In the absence of fraud, a bill in equity will not lie for the revision of an assessment for overvaluation, the remedy by appeal to the county board, as provided by Hurd's St. 1897, p. 1328, § 86, being adequate and exclusive.—*KOCHERSPERGER v. LARNED*, Ill., 49 N. E. Rep. 988.

155. NATIONAL BANKS—Insolvency—Payments.—*Rev. St. § 5242*, declaring void payments made by a national bank after the commission of an act of bankruptcy, or in contemplation thereof, with a view to prevent the lawful application of its assets, means an act of bankruptcy or insolvency in the legal sense of a failure to pay current obligations in the ordinary course, and does not invalidate payments made in the usual course of business before commission of any such act, and not in contemplation thereof, though the bank, if wound up at the time, would in fact be unable to meet all its obligations.—*HAYDEN v. CHEMICAL NAT. BANK OF NEW YORK*, U. S. C. C. of App., Second Circuit, 85 Fed. Rep. 874.

156. NEGLIGENCE—Action for Tort.—A person is not legally responsible for an injury which results to another from a lawful act, done by him in a lawful manner, and without any carelessness or negligence on his part.—*ULSHOWSKI v. HILL*, N. J., 39 Atl. Rep. 904.

157. NEGLIGENCE—Collision of Team and Pedestrian.—The questions of negligence and contributory negligence are for the jury where a boy, on coming to a street, looked up and down it, and, seeing a team coming "some distance away," started across; and, when on the crossing, was struck by the team, before knowing of its proximity; there being conflicting evidence as to the speed of the team, and testimony that the driver paid no attention to the hallooing intended to prevent the accident, and did not check his speed at the crossing.—*STREITFELD v. SHOEMAKER*, Penn., 39 Atl. Rep. 967.

158. NEGLIGENCE—Dangerous Exhibition—Independent Contractor.—The fact that a shooting exhibition was provided and conducted by an independent contractor, does not wholly relieve the principal from responsibility for accidents, since it would probably cause injury to a spectator, unless due precautions were taken to guard against harm.—*THOMPSON v. LOWELL, L. & H. ST. RY. CO.*, Mass., 49 N. E. Rep. 913.

159. NEGLIGENCE—Defective Highway.—In an action to recover damages sustained in consequence of an injury received through a defect in a highway, the question whether the fright or misconduct of the horse which was driven by the plaintiff is such as to be regarded as the direct, proximate cause of the injury is to be determined by the extent of such misconduct.—*MORSMAN v. CITY OF ROCKLAND*, Me., 39 Atl. Rep. 985.

160. NEGLIGENCE IN CARE OF WHARF—Use by Passengers—Contributory Negligence.—Plaintiff was injured by falling while descending a slippery incline at defendant's wharf or dock. For the accommodation and safety of passengers, this incline was provided with a rough gang plank, and also with a row of cleats, reaching from the top down to the boat, which plaintiff intended to board. Plaintiff noticed these arrangements, but chose to walk between them, where she testified it looked slippery and dangerous: Held, contributory negligence.—*PLANT INV. CO. v. COOK*, U. S. C. C. of App., Fifth Circuit, 85 Fed. Rep. 611.

161. NEW TRIAL—Rehearing—Newly Discovered Evidence.—A petition for rehearing, on the ground of newly-discovered evidence, must fully state, independently of the accompanying affidavits, the nature of the new evidence relied on, that it was not known to the petitioner until after the decree, and when it did first come to his knowledge. It must further disclose with particularity and detail sufficient facts to show that, with reasonable diligence, the new evidence could not have been known before the hearing on the merits.—*ALLIS v. STOWELL*, U. S. C. C., (E. D.) Wis., 85 Fed. Rep. 481.

162. PARENT AND CHILD—Death of Child—Rights of Parent.—It is essential to the maintenance of an action by a parent for the homicide of his child that the former should, at the time of the homicide be to a material extent dependent upon the latter for a support, and that the child should then be actually contributing thereto.—SMITH V. HATCHER, Ga., 29 S. E. Rep. 162.

163. PARTNERSHIP—Evidence.—Defendant, the owner of certain colts, agreed with A that the latter should train said colts without any expense whatever to defendant, and enter them in races. All winnings were to be equally divided after deducting the entrance fee for the race, and on sale of any of the colts the price was to be divided equally. The only liability defendant was in any event to be responsible for was the hiring of a certain jockey, if possible. Defendant did not hold himself out as a partner in the undertaking. Held, that it was error to refuse a peremptory instruction that defendant was not liable for supplies for the horses furnished to A, since no partnership existed.—STONE V. TURFMAN'S SUPPLY CO., Ky., 45 S. W. Rep. 78.

164. PARTNERSHIP—Judgment against Individual Partner—Lien.—One A, a member of a firm composed of himself and H, confessed judgment on December 23d to defendant, and on December 29th to plaintiff, executions being issued and levied on the firm property, which was sold, and the proceeds deposited to await the result of an action, brought to determine a claim made by plaintiff to priority over defendant. The partnership between A and H had expired by limitation before the entry of the judgments, but there had been no actual dissolution nor change of ownership of the property, and the firm was wholly insolvent. Held, that, as the judgments against A individually were liens only on his interest in the firm, which, because of its insolvency, was nothing, the judgments, executions and levies had no effect on the rights or equities of plaintiff and defendant, which remained as they were before the judgments were entered.—THOMAS ADAMS & CO. V. ALBERT, N. Y., 49 N. E. Rep. 929.

165. PARTNERSHIP—Powers of Members.—A person cannot be held liable for holding himself out as a member of a firm, unless the contract, debt or assurance sought to be enforced was entered into, incurred or executed through reliance on the credit of such person as an inducement thereto.—WALDRON V. HUGHES, W. Va., 29 S. E. Rep. 505.

166. PARTNERSHIP—Sales—Evidence.—In an action against a partnership for the price of goods sold to L, one of defendants claimed that he was not a partner, but testified that the only connection he had ever had with the firm was in lending its members money to carry on the business, and that, at the request of one of the members, he had several times made payments to plaintiff. Held, that it was proper for plaintiff to testify that all the money transactions with reference to goods sold the firm were with L, and that in none of them did he notify plaintiff that he was not a partner.—HAMPTON V. RAY, S. Car., 29 S. E. Rep. 537.

167. PAYMENT—Negotiable Notes—Accounts.—Where one accepts from another, in liquidation of an open account, a negotiable promissory note, he cannot recover in a suit upon the original cause of action, unless upon the trial he produces the promissory note, or satisfactorily accounts for its absence.—JACKSON V. BROWN, Ga., 29 S. E. Rep. 149.

168. PAYMENT BY NOTE—Pleading—Parties.—Where negotiable instruments are given in liquidation of an open account, and suit is afterwards brought upon the account itself, the defendant is not entitled to set up such liquidation as payment of the debt represented in the open account, unless it be alleged and proved that the debtor accepted such negotiable instruments as payment, or that thereafter such instruments were in fact paid to him. If, however, the fact of liquidation be relied upon, not as payment, but as a defense to the action upon the account, upon the theory that there had been a substitution of another cause of action for the cause of action represented in the account, then

such liquidation must be specially pleaded, with an averment that the negotiable instruments given in liquidation are outstanding at the time of the trial.—KIRKLAND V. DUFFUS, Ga., 29 S. E. Rep. 612.

169. PLEADING—Abatement—Another Action Pending.—The pendency of another suit between the same parties, for the same object, arising out of the same cause of action, will not abate suit unless specially pleaded in *limine*.—STATE V. RIEDY, La., 23 South. Rep. 327.

170. PLEADING—Demurrer—Capacity to Sue.—A demurrer to a complaint as not stating facts constituting a cause of action (Code, § 165, subd. 6), in that there are no allegations of the appointment of a guardian *ad litem* for infant plaintiffs, does not reach the question of legal capacity to sue, want of which is made a ground of demurrer by subdivision 2.—SMITH V. SMITH, S. Car., 29 S. E. Rep. 549.

171. PRINCIPAL AND SURETY—Release.—The surety on a sale bond, who signed it on condition that the deed be made to him instead of his principal, was not released by delivery of a deed to the principal, if it was done with the surety's consent.—ROBERTSON'S ADMR. V. MEREDITH, Ky., 45 S. W. Rep. 103.

172. PROCESS—Service—Acknowledgment—Manef. Dig. Ark. § 4978, which provides that service of summons may be acknowledged by defendant by an indorsement on the summons, signed and dated by him, and attested by a witness, does not render void a service made by writing a letter to defendant, informing him of the case, and requesting him to accept service, which he does over his signature on the same sheet of paper.—PHILLIPS V. COREY, I. T., 45 S. W. Rep. 119.

173. QUIETING TITLE—Ownership of Title—Mining Lands.—While, as applied to ordinary claims of real estate in non-mining States or territories, the rule is general that to entitle the claimant to maintain an action to quiet title he must be the owner of the title to the land, yet, in respect to claims to mining lands in the western States and territories, a system of mining customs, wages, and rights has developed taking the form and sanction of prescriptive laws of universal recognition, which national and State legislatures later crystallized into written statutes, and in which ownership of the title is not essential to the maintenance of such an action.—GILLIS V. DOWNEY, U. S. C. C. of App., Eighth Circuit, 85 Fed. Rep. 483.

174. RAILROAD COMPANY—Animals—Stock Laws—Cattle Guards.—In a district where a stock law is in force forbidding the owner to allow his stock to run at large except upon his own lands, it is unnecessary for a railroad company to erect stock gaps and cattle guards.—CANTON, A. & N. R. CO. V. FRENCH, Miss., 28 South. Rep. 357.

175. RAILROAD COMPANY—Change of Street Grade.—A railroad corporation, which, under its charter, constructs its tracks across an existing public highway or street of a city, does so on the implied condition that it will yield to the reasonable burdens imposed by the growth and development of the country or the city, and, where the public welfare demands a change of the grade of the highway or street, the railroad company must, at its own expense, make such alteration in the grade of its crossing as will conform to the new grade.—CLEVELAND V. CITY COUNCIL OF AUGUSTA, Ga., 29 S. E. Rep. 584.

176. RAILROAD COMPANY—Contributory Negligence.—Plaintiff, driving a spirited horse, approached a railroad crossing, with which he was perfectly familiar, from a direction from which he could have an unobstructed view for a considerable distance, until he got near the crossing, when his view would be obstructed by a bank. He trotted his horse with a slack rein until within 60 or 70 feet of the crossing, when he heard the whistle of a regular train. It was too late for him to stop. His horse became unmanageable, and plunged forward, striking the rear of the third car. Plaintiff was thrown to the ground, and the horse died from his injuries. Held, plaintiff's contributory

negligence barred recovery.—*MCCANNA v. NEW ENGLAND R. CO.*, R. I., 39 Atl. Rep. 891.

177. **RAILROAD COMPANY—Fires—Negligence.**—In the absence of contributory negligence, a railroad company is liable for damages resulting from a fire kindled on its right of way, even though its servants who kindled it, were acting outside the scope of their authority, where the company negligently permitted the fire to spread.—*ST. LOUIS & S. W. RY. CO. v. FORD*, Ark., 45 S. W. Rep. 55.

178. **RAILROAD COMPANY—Injury from Flying Switch—Contributory Negligence.**—Code 1892, § 5348, declaring that, in case of injury from a flying switch within a municipality, the railroad company shall be liable, without regard to "mere contributory negligence" of the person injured, does not introduce degrees of contributory negligence; and nothing short of willful and wantonly reckless conduct will bar right of recovery.—*PULLIAM v. ILLINOIS CENT. R. CO.*, Miss., 23 South. Rep. 359.

179. **RAILROAD COMPANY—Killing Dog on Track.**—A dog is "property," within the meaning of the statutes of Mississippi on that subject.—*JONES v. ILLINOIS CENT. R. CO.*, Miss., 23 South. Rep. 358.

180. **RAILROAD COMPANY—Street Railway—Legal Tender.**—A dollar bill from the upper left-hand corner of which a piece one inch and a half by one inch and a quarter had been torn is not a legal tender for car fare, and the conductor may eject a passenger who refuses to make other payment. He was not bound to accept a bill which was substantially mutilated. If any part was absent which might aid in determining whether it was genuine, he was under no duty to receive it.—*NORTH HUDSON COUNTY RY. CO. v. ANDERSON*, N. J., 39 Atl. Rep. 905.

181. **RAILROAD COMPANY—Street Railroads—Malignant Prosecution.**—A street car company is not liable for the acts of its conductor in prosecuting a passenger for violation of a city ordinance making it a misdemeanor for any person to ride on a street car without paying his fare, in the absence of express authority from the company to the conductor to make such prosecution.—*LITTLE ROCK TRACTION & ELEC. CO. v. WALKER*, Ark., 45 S. W. Rep. 57.

182. **RAILROAD COMPANY—Street Railroads—Negligence.**—Where one injured by a street car near the intersection of a street had been standing in the center of the track for three or four minutes, and the motor-man had had an unobstructed view all the way from the street last passed, the question whether the motor-man used due care to avoid the accident was for the jury.—*BALTIMORE CITY PASS. RY. CO. v. COONEY*, Md., 39 Atl. Rep. 859.

183. **REAL ESTATE AGENT—Commissions.**—An agent, under his contract, was to receive a commission for trading certain lands for any real estate his principal might approve; but, if no actual transfers of property were made, no commissions were to be due. The evidence showed that he introduced a customer, who exchanged deeds without conditions with the principal; but, the principal becoming dissatisfied, the customer reconveyed a portion of the land. It did not appear what the principal did with the deeds from his customer: Held, to justify a finding that the exchange of deeds was an approval of the lands received by the principal, and that an actual transfer by both parties was made.—*QUITZOW v. PERKIN*, Cal., 52 Pac. Rep. 632.

184. **RECEIVERS—Ancillary Appointment—Comity.**—A receiver who, in the court of his primary appointment, obtained a continuance of an action pending therein, on condition that he would not press to trial a suit then pending between the same parties in the court of his ancillary appointment, will not be permitted by the latter court to violate the condition, when the opposite party insists on its observance by a motion for continuance.—*WHEELING BRIDGE & TERMINAL RY. CO. v. COCHRAN*, U. S. C. C., N. D. (Ohio), 85 Fed. Rep. 500.

185. **RECEIVERS—Custodia Legis.**—In administering property of one person in the hands of a receiver, the

court has no authority to draw to its possession the property of another person not a party to the proceeding, and hence a receiver wrongfully taking possession of such property is a trespasser.—*FARMERS' & MRR. NAT. BANK OF WACO v. SCOTT*, Tex., 45 S. W. Rep. 26.

186. **RECEIVERS—Grounds for Appointment.**—When a guarantee has taken from the guarantor no assurance of the guaranty by mortgage or otherwise, so as to create a lien in his favor upon the property of the latter, the mere existence of the contract of guaranty presents no obstacle, legal or equitable, to such disposition of his property as the guarantor may deem proper; and the fact that a guarantor may become insolvent, or may waste his goods, before there is a breach of the contract upon the part of the principal, and before such time as the guarantor shall have become answerable upon his undertaking, affords no reason for the intervention of a court of equity, nor any reason for the grant of an injunction or the appointment of a receiver to seize and hold the guarantor's estate. Equitable seizures of a debtor's goods, except in cases especially authorized by statute, are not allowable at the instance of unsecured creditors.—*GUILMARTIN v. MIDDLE GEORGIA & A. RY. CO.*, Ga., 29 S. E. Rep. 139.

187. **REMOVAL OF CAUSES—Local Prejudice.**—Under section 2 of the judiciary act of March 3, 1875 (18 Stat. 470), as amended by Act Aug. 13, 1888 (25 Stat. 433), relating to removal of suits to the circuit court on the ground of prejudice or local influence, the evidence necessary to support the federal jurisdiction does not have to prove morally that the petitioning defendant cannot obtain a just decision in the State court, but it is only necessary to present to the circuit court evidence suitable to the case, and sufficient to prove legally that prejudice and local influence does exist which will naturally operate to the disadvantage of the defendant in the trial of his case before a State tribunal.—*CITY OF TACOMA v. WRIGHT*, U. S. C. C., D. (Wash.), 85 Fed. Rep. 836.

188. **SALE—Condition Precedent.**—Where a vendor of horses represents that they are of such pedigree as entitles them to registry, and that he will procure the requisite certificates therefor, and the vendee takes immediate possession, and for more than a year uses the horses as his own, with no attempt to rescind for failure of the vendor to furnish said certificates, such representation is not a condition precedent to the right of recovery on the purchase-money notes.—*BROWN v. ELLIS*, Ky., 45 S. W. Rep. 94.

189. **SALE—Delivery—Title.**—Where the contract between a vendor and vendee is silent upon the subject of the place of delivery, then the delivery of the property by the vendor to a carrier for transportation, consigned to the vendee, divests the vendor's title to the property, and the vendee's title from the moment of such delivery to the carrier attaches.—*NEIMEYER LUMBER CO. v. BURLINGTON & M. R. CO.*, Neb., 74 N. W. Rep. 670.

190. **STATE AND FEDERAL COURTS—Concurrent Suits—Suspension of Proceedings in Second Suit.**—While, as between two suits for the same relief in the enforcement of a lien on specific property, or similar purposes—one in the State and the other in the federal court—the one in which process is first issued and served must be allowed to proceed without interference from the other, the practice is not to dismiss, but to suspend action in the second suit until the first is tried and determined.—*HUGHES v. GREEN*, U. S. C. C. of App., Eighth Circuit, 85 Fed. Rep. 833.

191. **STATUTES—Ascertainment of Meaning.**—For the purpose of construing and ascertaining the meaning of an act passed by the general assembly, and after the date of its enactment incorporated in the present code of this State, it is legitimate and proper to examine and consider the original act and its title; and, whatever result would follow where the terms of a code-section vary materially from those of the act from which it was codified, if such a section is in substantially the same words as those used in the act from which it was

taken, the language employed in such section should receive the same construction as would be given thereto upon a construction of the act itself.—*COMER V. STATE*, Ga., 29 S. E. Rep. 501.

192. **TAXATION—Notice to Assessors—Non-residents.**—Pub. St. ch. 11, § 38, requiring the inhabitants to file with the assessors lists of their polls and property for taxation, within the time specified in the notice therein provided for, does not apply to non-residents.—*HOPKINS V. TOWN OF READING*, Mass., 49 N. E. Rep. 923.

193. **TENANTS IN COMMON—Purchase of Common Property.**—Purchase of common property by part of the tenants in common, at sheriff's sale thereof to satisfy liens, will be held to be for the benefit of all, the purchasers having been able to raise by mortgage enough to pay the liens, and having had this in mind while leading the others, poor and inexperienced in business, to understand that only those having money could have their shares.—*MCGRANIGHAN V. MCGRANIGHAN*, Penn., 39 Atl. Rep. 951.

194. **TRADE-MARKS AND TRADE-NAMES—Unfair Competition.**—One is entitled to sell his product under his own name, either individually or in connection with a partner; but in so doing he must be careful not to do anything calculated to delude the public into the belief that his goods are those of another having the same name; and, if the latter has first acquired a reputation for the particular kind of goods, the former may be enjoined from selling like goods except in connection with a clear statement indicating that they are not the goods of the latter.—*ALLEGRETTI CHOCOLATE CREAM CO. V. KELLER*, U. S. C. C., S. D. (N. Y.), 85 Fed. Rep. 643.

195. **TRESPASS—Concealment of Property Levied on.**—A claimant of personality levied on under an execution issued upon the foreclosure of a chattel mortgage, who fraudulently removed and concealed the property, and thus destroyed the security of the mortgagee, became, after so doing, liable in damages to the latter.—*REID V. MATTHEWS*, Ga., 29 S. E. Rep. 173.

196. **TRESPASS—Replevin—Services of Writ.**—An officer has no right to break an outer door of a dwelling house to execute a writ of replevin.—*KELLEY V. SCHUTLER*, R. I., 39 Atl. Rep. 893.

197. **TRIAL—Admission of Improper Evidence.**—When illegal evidence is admitted against the objection of a party, it will be presumed that it prejudiced such party; and, if it may have prejudiced him, though it be doubtful whether it did or not, it will be cause for reversal of the judgment.—*WEBB V. BIG KANAWHA & O. R. PACKET CO.*, W. Va., 29 S. E. Rep. 519.

198. **TRUSTS—Joint Trusts—Rights of Cestui Que Trustent.**—Where property is devised in trust, half the income to be paid to testatrix's son, and half to her daughter, for life, with cross remainders from one to the other, as to the principal, in case either died without issue, or disposition of his or her share, there is a joint trust, so that a mortgage taken from the trustee by the son, to protect his share, inures to the benefit of both.—*IN RE DU PLAINE'S ESTATE*, Penn., 39 Atl. Rep. 967.

199. **TRUSTS—Unrecorded Deed—Laches.**—In an action to enforce an unrecorded trust deed, defendant had judgment on the ground of plaintiff's laches. Plaintiff appealed, and defendant also gave notice of appeal, on the ground that the court erred in not further finding that she was a subsequent grantee for value, without notice: Held, that defendant merely requested an affirmation on an additional ground.—*O'CAIN V. O'CAIN*, S. Car., 29 S. E. Rep. 68.

200. **TRUSTEES—Personal Liability.**—Where grantees gave a bond and mortgage to secure the purchase price of land granted to them as trustees, but signed without appending to their names the word "Trustees," they are personally liable for the debt.—*WALLACE V. LANGSTON*, S. Car., 29 S. E. Rep. 552.

201. **USURY AFTER MATURITY.**—Where a note drawing interest at 10 per cent. per annum was, after maturity, extended in consideration of the payment of 1 1/2 to 2

per cent. per month, and also a fee to the holder's agent for collecting such interest, the sums so paid should be credited on such note, as such subsequent agreements for usury did not affect the validity of the original transaction.—*MCLEWIN V. HUMPHREY*, I. T., 45 S. W. Rep. 114.

202. **VENDOR'S LIEN—Purchase Money Mortgage.**—Where, in a contract for the sale of real estate, the parties agree that the purchaser is to have time for the payment of the whole or any part of the purchase money, and that the vendor shall have a lien upon the property as security for a deferred payment, to be evidenced by a mortgage, and a mortgage is accordingly executed by the purchaser before the conveyance of title has been consummated, the conveyance of the title, and the mortgage evidencing the vendor's lien, are in law one transaction, and the title passes from the vendor to the purchaser *cum onere*.—*BALFOUR V. PARKINSON*, U. S. C. C., D. (Wash.), 85 Fed. Rep. 855.

203. **VENDOR'S LIEN ON CROPS—Exemptions.**—A stipulation in a note for the price of land, reciting that the vendor retains a lien on all crops, does not operate as a waiver of the vendee's right to claim as exempt, out of such crops, food sufficient for one year, as provided by statute.—*COLUMBIA FINANCE & TRUST CO. V. MORGAN*, Ky., 45 S. W. Rep. 65.

204. **VENDOR AND PURCHASER—Assumption of Mortgage.**—One taking a deed to land incumbered with mortgages does not thereby assume the payment of the mortgages, in the absence of a clause in the deed to that effect.—*PEEK V. HEWLETT'S EXRS.*, Ky., 45 S. W. Rep. 104.

205. **VENDOR AND PURCHASER—Foreclosure of Lien.**—Where one of the defendants in an action to foreclose a vendor's lien sought to bring in a third party, on an issue which had no relation to the matter involved in the pending action, without serving such party, or obtaining leave of court to bring him in, or otherwise calling attention to such cross action until after judgment of foreclosure had been rendered, such judgment was final, though no disposition of such cross action was made therein, as such third party was not a party to plaintiff's suit.—*HARRIS V. SANDERS*, Tex., 45 S. W. Rep. 29.

206. **VENDOR AND PURCHASER—Fraud—Rescission.**—Where an agent of a vendor, one of the promoters of a corporation organized to buy certain land, had already acquired the privilege of buying the land at a much lower figure than that represented to subscribers in the corporation, and the vendor, with full knowledge of the facts, conveyed the property to said agent, who conveyed it to the corporation, and, on payment of the consideration to the vendor, the agent received from it the difference between the actual and the ostensible prices, the vendor must, on being put *in statu quo*, at the corporation's election, pay back the price.—*LIMITED INV. ASSN. V. GLENDALE INV. ASSN.*, Wis., 74 N. W. Rep. 633.

207. **VENDOR AND PURCHASER—Rescission of Contract.**—Complainant contracted to purchase realty from executors, and, after making the first payment and securing the others, discovered that the executors had no power under the will to make a deed: Held, that he was entitled to rescind, although the executors offered to indemnify him, and to procure power from court to make a conveyance.—*POTTER V. RANLETT*, Mich., 74 N. W. Rep. 661.

208. **WILLS—Construction.**—Testator gave his wharf to his son for life, remainder to his children then living. He bequeathed the income of certain bank stock to his son for life, the stock, after his death, to be divided among his children then living. All the residue of his estate he gave to his son. When the son died, he had grandchildren, but no children, living, and he bequeathed the bank stock to his widow: Held, that the testator meant his son's children, and not his grandchildren, living at the time of the son's death in the bequest of bank stock.—*IN RE REYNOLDS*, R. I., 89 Atl. Rep. 896.

209. **WILLS—Construction—Trusts.**—Testator devised lands to his son "in special trust and confidence as trustee" of his daughter, with directions to permit her to occupy and enjoy the same for her separate use, free from the debts or control of her husband; the land at her death to descend to the issue of her body; if she left no issue, then to revert to the residuary estate. The trustee was authorized, if fully satisfied of the propriety thereof, to surrender the trust, and assign the same to the beneficiary, but this was never done: Held that the children of the daughter took no interest whatever in the land until her death, and only on condition of surviving her.—*BUCHANAN v. DENIG*, U. S. C. C., W. D. (Penn.), 85 Fed. Rep. 863.

210. **WILLS—Conversion—Rights of Life Tenant.**—Under a will giving to testator's wife, for life, the income of his estate, and authorizing the executors at her death to sell the realty, and divide the proceeds between testator's two children, S and G, "if they be living, or the issue of such of them as may then be deceased," G having died before testator, unmarried, and S having died before testator's widow, leaving a husband and two sons, one of whom also died during the life tenancy, leaving a widow, there is no conversion, the purpose thereof (a division between testator's two children) having failed; so that the lapsed shares devolve in their original character, the real estate to the sole heir, the remaining grandson, subject to the life estates of the father and the brother's widow.—*IN RE RUDY'S ESTATE*, Penn., 39 Atl. Rep. 968.

211. **WILLS—Description of Property—"Stock."**—Testator gave his wife several tracts of land, two horses, and two cows, and other personality. He also gave land to each of several children, and, in a separate paragraph, declared that "all my notes, bonds, stock, and money on hand I wish divided between my wife" and children named: Held, that the word "stock" meant bonds and evidence of shares in corporations, and not live stock.—*CAPEHART v. BURRUS*, N. Car., 29 S. E. Rep. 97.

212. **WILLS—Designation of Beneficiaries.**—Testator provided that, if his daughters died without issue, the portion devised for their benefit "should, at their death, revert to my children who may survive, or to the descendants of their children, and be equally divided between them." Both daughters died without issue, leaving brothers and children of a deceased brother. The entire will manifested an intent to establish absolute equality of distribution among testator's descendants: Held, that while, in the absence of the words "or to the descendants of their children," etc., the children of the deceased brother could not take, such words could not, in view of testator's intent, be rejected as meaningless, and the court would construe "or" in said clause as "and," and "their" as "my," and consequently the deceased brother's children would share in the estate with the surviving brothers.—*SLINGLUFF v. JOHNS*, Md., 39 Atl. Rep. 872.

213. **WILLS—Life Estate.**—Testator's wife, to whom he devises his estate for her sole "use and benefit," "so long as she remains my widow," takes a life estate, determinable on her marrying.—*FULLER v. WILBUR*, Mass., 49 N. E. Rep. 916.

214. **WILL—Nature of Estate.**—Under a devise in trust for E, without words of inheritance, the trust to cease on E reaching the age of 23, or marrying, and the property to go to S if E die without issue, S takes on the death of E without issue, though she had reached the age of 23.—*DORR v. JOHNSON*, Mass., 49 N. E. Rep. 919.

215. **WILLS—Perpetuities—Devises.**—A devise to trustees, to hold and manage for 75 years, and annually pay the income to testator's children, does not violate the rule against perpetuities; the estate, both legal and equitable, being vested at once.—*IN RE JOHNSTON'S ESTATE*, Penn., 39 Atl. Rep. 879.

216. **WILLS—Power of Appointment.**—A power of appointment conferred on testator is exercised by his will devising and bequeathing all his estate, both real and personal, "according to the intestate laws of the

State;" Act June 4, 1879, declaring a general gift of the real or personal estate of a testator shall include any estate over which he has a power of appointment.—*IN RE HOWELL'S ESTATE*, Penn., 39 Atl. Rep. 966.

217. **WILL—Revocation—Marriage.**—Bill by heirs to have will declared revoked by subsequent marriage of testator, alleging an antenuptial contract of wife to take, in lieu of dower and all claims, \$2,000, to be paid within 60 days after death of testator, and the payment of same, and receipt therefor by widow, need not allege facts showing full knowledge by her of testator's property, the contract being executed, and the burden being on her if, for any reason, she could set aside the contract and settlement.—*HUDNALL v. HAM*, Ill., 49 N. E. Rep. 985.

218. **WILL—Testamentary Powers.**—A testator devised his estate to his widow for her use during her life, with power to sell or dispose of for her support: Held, that the power was personal, and, where she failed to exercise it, the estate did not become liable for debts incurred by her for her support.—*RYAN v. MAHAN*, R. I., 39 Atl. Rep. 893.

219. **WITNESS—Arrest—State and Federal Courts.**—A witness coming into the State in obedience to a subpoena from a federal court is not subject to arrest on State criminal process, and, if so arrested, will be released on *habeas corpus*, and safely conducted from the State by the marshal.—*UNITED STATES v. BAIRD*, U. S. D. C., D. (N. J.), 85 Fed. Rep. 633.

220. **WITNESS—Competency.**—In a contest arising out of an application for letters of administration between the brother of the decedent, as applicant, and a person claiming to be his wife, as caveatatrix, but whose right to administer is attacked on the ground that the marriage is void because the decedent was insane at the time it was contracted, the caveatatrix is a competent witness in her own favor to testify to any matters relevant and material to the issue.—*BUCHANAN v. BUCHANAN*, Ga., 29 S. E. Rep. 608.

221. **WITNESS—Competency.**—An agent of a corporation is not incompetent, under section 5269 of the Civil Code, to testify to communications or transactions had with the deceased agent of a firm or individual.—*MAXWELL v. IMPERIAL FERTILIZER CO.*, Ga., 29 S. E. Rep. 597.

222. **WITNESS—Competency.**—One's experience in management of a stationary engine does not make him competent to testify that a jerk is unnecessary in starting up a train with a locomotive.—*WILLIAMS v. LOUISVILLE & N. R. CO.*, Ky., 45 S. W. Rep. 71.

223. **WITNESSES—Evidence of Character—Ex convict.**—A party who is obliged to use as a witness an ex-convict may show by his testimony that he was a "trustee."—*TENNESSEE COAL, IRON & RAILROAD CO. v. HALEY*, U. S. C. C. of App., Fifth Circuit, 85 Fed. Rep. 534.

224. **WITNESS—Transactions with Decedent.**—Horne's Rev. St. 1897, §§ 498, 502 (Burns' Rev. St. §§ 506, 510), *inter alia* provide that, in an action against an estate, any necessary party whose interest is adverse shall not be a competent witness against the estate, but that the court may, in its discretion, require any party to testify: Held, in an action on a note by a wife against her husband's estate, that the court properly allowed her to testify to the loss of the note during her husband's lifetime.—*SCHLEMMER v. SCHENDORF*, Ind., 40 N. E. Rep. 968.

225. **WITNESSES—Transactions with Decedent.**—Credits entered on the back of a note during the lifetime of the maker are *prima facie* payments on the note, and cannot be explained by testimony of the payee after maker's death, under Civ. Code, § 606, subsec. 2, providing that "no person shall testify for himself concerning any verbal statement of or transaction with" one who is dead when the testimony is offered; and the fact that such credits were made by the payee himself, and in the absence of decedent, does not alter the case.—*VANNATTA v. WILLETT'S ADMR.*, Ky., 45 S. W. Rep. 85.